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13—Record of registration of an automobile for the year 1937 under Lic. #3-P-4910 in the name of Clara Grimaldi, Utica, N. Y. ..... Photostat
14—Reg. P-4322, Elizabeth Ferro. Not printed.
15—Reg. 225,744, John Ferro. Not printed.
20—Reg. 2-P-8865, Joe Bonanza. Not printed.
25—Reg. 2-P-736, Walter Melito. Not printed.
26—Record of registration of an automobile for the year 1938 under Lic. #2-P-2249 in the name of Michael Columbio, Utica, N. Y. ..... Photostat

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27—Reg. 3-P-4406, George Bonanza. Not printed.		
33—Reg. 4-P-3188, Frank Terria. Not printed.		
36—Reg. 224,988, Nicholas Blase. Not printed.		
37—Reg. 223,888, Rocco Caruso. Not printed.		
38—Reg. 3-P-1977, 8-P-6797, Dominic Pinto. Not printed.		
40—Ledger Page, Citizens Bank & Trust Co. Not printed.		
41—Water records—632 Rosemont Place. Not printed.		
42— " " 726 Catherine St. (1934). Not printed.		
43— " " 510 Millgate St. Not printed.		
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46— " " 1605 Girard St. Not printed.		
47— " " 1934 Beach Grove Place. Not printed.		
48— " " 310 Pitcher St. Not printed.		
50— " " 726 Catherine St. (1937). Not printed.		
51— " " 910 Morris St. Not printed.		
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Sup. Ct

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 42

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE AND JOHN NOLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1940

CERTIORARI GRANTED MAY 20, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE AND JOHN NOLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, LAWRENCE GRIMALDI, NICHOLAS NOLE, JOHN NOLE, JOHN MELITO, SALVATORE A. GRANIERO, FRANK JOSEPH MILOZZO, FRANK SOLDANO, *defendants-appellants*

Statement under rule 13, subdivision 4

The indictment herein was filed on October 26, 1938. It charged the crime of Conspiracy to Violate the Internal Revenue Laws in Violation of Section 37 of the Criminal Code against the following defendants: Salvatore Falcone, Joseph Falcone, John Melito, Henry Alberico, John Ambroselli, Fred Apelian, Joseph Battaglia, George Blake, Nicholas Blase, George Bonanza, Joseph Bonanza, Sam Brown, alias Sam Barone, Anthony Bruno, the name being fictitious and the person intended to be designated being the person who rented premises situate at 58–60 North Genesee Street, Utica, New York, on or about December
2 1937. Joseph Calabrese, Rocco Caruso, Michael Colombia, the said name being fictitious and the person intended to be designated being the person in whose name a 1933 Ford two-door automobile license number 2P–2249 was licensed and registered by the State of New York for 1938, Joseph Coronato, Patrick DeRosa, Lorenzo DiCellio, Eugene Anthony DiFondi, Daniel DiJoseph, Ben Doe, the name being fictitious, the person intended to be designated being a person bearing the nickname of "Mussolini" and being one of the persons who operated and assisted in operating an illegal still on the Bortiatynski farm, so-called, at or near Lee Center, New York, during the month of January, 1938. Richard Doe, the said name being fictitious, the person intended to be designated being a person bearing the nickname "Mosey" and being the person who drove a truck carrying supplies to a certain illegal still situate on the Bortiatynski farm, so-called, at or near Lee Center, N. Y., during the month of January 1938, and which also carried illegal alcohol from the said premises during the same period. A Donato, the name being fictitious and the person intended to be designated being the person who entered into a lease for premises situate on Frances Street, in the Town of New Hartford, New York, on September 1, 1938. Joseph Enearl, the said name being fictitious and the person intended to be designated being the person who applied for water service on or about the month of December 1937 for the

premises situate at 910 Morris Street, Utica, New York. Nick Fabrizio, Anthony Fagan, the name being fictitious and the person intended to be designated being the person who leased from Sam Madonia, certain premises situate at No. 203–205 S. Charles Street, Rome, New York, in the latter part of July 1938. Julia Falotico, Rocco Falotico, Enrico Ferro, alias Enrico Henry Garcia, Salvatore A. Graniero alias Fats Grande, Anthony Gravina, Lawrence Grimaldi, alias Lorenzo Grimaldi, Michael Kane, the name being fictitious and the person intended to be designated being the person who entered into a lease for premises situate at 726 Catherine Street, Utica, New York, on or about July 19, 1937. Paul Kiscel, the name being fictitious, the person intended to be designated being the person who rented premises at 726 Catherine Street, Utica, New York, some time during the month of October 1934. John Koval, also known as John Kova, the name being fictitious, the person intended to be designated being the person who leased premises at 101 Clinton Street, Whitesboro, New York, on or about November 1, 1936. Daniel LaBella, Filippo Lamonica, alias Joe Garruba, Antonio Laratro, Ralph Lasondo, Dominick Luvera, Emil Maciol, Sam Madonia, Emmet Marrone, Vincent Marrone, Walter Melito, Frank Joseph Milozzo, Edoaro Mingo, the name being fictitious and the person intended to be designated being the person who executed a lease for premises situate at 910 Morris Street, Utica, New York on September 28, 1937. Paul Mira, Frank Morino, Allie Morreale, alias "Meanie," Salvatore Morreale, John Nole, Nicholas Nole, Natale Ormarso, Dominick Pangello, Joseph Pepetti, alias Joseph Salemo, Elmer Pflanz, Dominick Pinto, the said name being fictitious and the person intended to be designated being the person in whose name a 1937 Terraplane
4 automobile license number 3P–1977 was licensed and registered by the State of New York for 1937. Peter Pizzuto, the name being fictitious and the person intended to be designated being the person who executed a lease for premises at 632 Rosemont Place, Utica, New York, on or about March 15, 1934. Joseph Sarcone, Charles John Skora, Frank Soldano, Frank Summa, the said name being fictitious and the person intended to be designated being the person who leased premises situate at 1166 Webster Avenue, Utica, New York, from Paolina Aiello by written lease dated December 27, 1937. Frank Terra, the said name being fictitious and the person intended to be designated being the person who purchased certain property situate and known as 400 Railroad Street, Frankfort, New York, in the month of December 1936. Peter Tocco, the name being fictitious and the person intended to be designated being the person in

whose name a Ford automobile bearing license plates 8P–8678 was registered by the State of New York, during the year 1937. Frank Tretto, Frank Wheeler, the said name being fictitious, the person intended to be designated being a person who purchased certain property known as the Baldwin Milk Station, near Sherburne, New York, on or about February 25, 1937.

On February 13, 1939, the following were arraigned and pleaded not guilty: Daniel DiJoseph, Frank J. Milozzo, Frank Morino, Salvatore Falcone, Joseph Falcone, John Melito, Henry Alberico, Joseph Battaglia, George Bonanzo, Sam Brown, Enrico Ferro, Salvatore A. Graniero, Sam Madonia, Walter Melito, Nicholas Nole, Elmer Pflanz, Joseph Sarcone, Frank Tretto,
5 Nicholas Blase, Joseph Calabrese, Joseph Bonanza, Rocco Caruso, Patrick DeRosa, Lorenzo DeCellio, Eugene Anthony DiFondi, Nick Fabrizio, Julia and Rocco Falotico, Anthony Gravina, Lawrence Grimaldi, Daniel LaBella, Filippo Lamonica, Dominick Luvera, Emil Maciol, Emmett and Vincent Marrone, Paul Mira, Dominick Morreale, Savatore Morreale, John Nole, Natale Ormarso, Joseph Pepetti, correct name Zapetti, Charles John Skora, Frank Soldano, and George Blake.

All of the defendants except Daniel DiJoseph and Frank J. Milozzo and Frank Morino were admitted to bail.

On May 8, 1939, the defendants Fred Apelian, Joseph Coromato, indicted as Joseph Coronato and Dominick Pangello, were arraigned. The defendant, Fred Apelian, pleaded guilty. The sentence was deferred. The defendants, Joseph Coronato and Dominick Pangello, pleaded not guilty and were admitted to bail.

On May 9, 1939, the defendant, Sam Barone, indicted as Sam Brown, withdrew his plea of not guilty and sentence was deferred.

On May 9, 1939, the defendant, George Blake, withdrew his please of not guilty and pleaded guilty. Sentence was deferred.

On May 9, 1939, on motion of the United States Attorney, an order was made granting a severance as to defendant, Salvatore Morreale.

On May 10, 1939, the defendants, Filippo LaMonica and Frank Morino, withdrew their plea of not guilty and pleaded guilty. Sentence was deferred.

The cause came on to be heard before Honorable Frederick H.
6 Bryant, United States District Judge, and a jury in the District Court of the United States for the Northern District of New York, on May 10, 1939, at Syracuse, New York.

The following named defendants were tried: Henry Alberico, Joseph Battaglia, Nicholas Blase, George Bonanza, Joseph Bonanza, Joseph Calabrese, Rocco Caruso, Joseph Coromato, Patrick DeRosa, Lorenzo DiCellio, Eugene A. DiFondi, Daniel DiJoseph,

Nick Fabrizio, Julia and Rocco Falotico, Enrico Ferro, Salvatore A. Graniero, Anthony Gravina, Lawrence Grimaldi, Daniel LaBella, Dominick Luvera, Emil Macial, Sam Madonia, Emmett and Vincent Marrone, Walter Melito, Frank J. Milozzo, Paul Mira, Dominick Morraele, John and Nicholas Nole, Natale Ormarso, Dominick Pangello, Joseph Zapetti, Elmer Pflanz, Joseph Sarcone, Charles John Skora, Frank Soldano and Frank Tretto, Salvatore and Joseph Falcone, and John Melito.

The trial continued until June 17, 1939.

On June 7, 1939, at the close of the Government's case and on motion of the United States Attorney, the indictment was dismissed as to the following named Defendants: Joseph Calabrese, Joseph Coromato, Julia Falotico, Nick Fabrizio, Anthony Gravina, Emil Maciol, and Sam Madonia.

On June 8, 1939, an order was made granting a severance as to the defendant, Daniel DiJoseph.

On June 8, 1939, on motion of their attorneys, the indictment was dismissed as to the following named defendants: Dominick Luvera, Frank Tretto, Rocco Falotico, Patrick DeRosa, Dominick Pangello, Eugene Anthony DiFondi, Lorenzo DiCellio, Natale Ormarso, and Joseph Sarcone.

On June 9, 1939, and during the trial the defendant, Elmer Pflanz, withdrew his plea of not guilty and pleaded guilty. Sentence was deferred.

7 On June 17, 1939, the jury returned a verdict of finding the following-named defendants guilty as charged: Henry Alberico, Nicholas Blase, George Bonanza, Joseph Bonanza, Rocco Caruso, Joseph Falcone, Salvatore Falcone, Enrico Ferro, Salvatore A. Graniero, Lawrence Grimaldi, Daniel LaBella, Emmett Marrone, John Melito, Walter Melito, Frank Joseph Milozzo, Paul Mira, Dominick Morreale, John Nole, Nicholas Nole, Charles John Skora, and Frank Soldano.

On June 17, 1939, the jury by its verdict found the following defendants not guilty: Joseph Battaglia, Vincent Marrone, Joseph Zapetti.

On June 27, 1939, the Court pronounced sentence as follows:

Salvatore Falcone to be confined in any Institution designated by the Attorney General for one year and five months and to pay a fine of $6,000.00 and to stand committed until paid.

Joseph Falcone to be confined in any Institution designated by the Attorney General for two years and to pay a fine of $7,500.00 and to stand committed until paid.

John Melito to be confined in any Institution designated by the Attorney General for one year and one day and to pay a fine of $100.00 and to stand committed until paid.

Henry Alberico to be confined in any Institution designated by the Attorney General for one year and one day and to pay a fine of $3,000.00 and to stand committed until paid.

Fred Apelian to be confined in any Institution designated by the Attorney General for one year and one day.

Nicholas Blase to be confined in the Oneida County Jail for six months.

8 George Bonanza to be confined in any Institution designated by the Attorney General for one year and one day.

Joseph Bonanza to be confined in the Oneida County Jail for four months.

Sam Barone to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for two years and eight months and defendant to be on probation.

Rocco Caruso to be confined in the United States Penitentiary at Lewisburg for one year and one day; execution of sentence to be suspended for four years and defendant to be on probation.

Enrico Ferro (correct name Enrico Henry Garcea) to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for five years and defendant to be on probation.

Salvatore A. Graniero to be confined in any Institution designated by the Attorney General for two years.

Lawrence Grimaldi to be confined in any Institution designated by the Attorney General for one year and eight months.

Daniel LaBella to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for one year and ten months; execution of sentence to be suspended for four years and defendant to be on probation.

Filippo Lamonica to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for one year and two months; execution of sentence to be suspended for three years and six months and defendant to be on probation.

Emmett Marrone to be confined in the Oneida County

9 Jail for six months; execution of sentence to be suspended for three years and defendant to be on probation.

Walter Melito to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for five years and defendant to be on probation.

Frank Milozzo to be confined in any Institution designated by the Attorney General for one year and three months.

Paul Mira to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for four years and defendant to be on probation.

Frank Morino to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for four years and defendant to be on probation. In case probation is violated, sentence is to run concurrently with a sentence imposed in case #27657.

Dominick Morreale to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for one year and six months; execution of sentence to be suspended for four years and defendant to be on probation.

John Nole to be confined in any Institution designated by the Attorney General for one year and five months and to pay a fine of $2,000.00 and to stand committed until paid.

Nicholas Nole to be confined in any Institution designated by the Attorney General for two years.

Elmer Pflanz to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for five years and defendant to be on probation.

Charles John Skora to be confined in the United States Penitentiary at Lewisburg, Pennsylvania, for two years; execution of sentence to be suspended for four years and defendant to be on probation.

Frank Soldano to be confined in any Institution designated by the Attorney General for one year and four months.

On June 28, 1939, the following-named defendants filed and served notices of appeal: John Melito, Henry Alberico, Joseph Falcone, Salvatore Falcone, Lawrence Grimaldi, Nicholas Nole, Salvatore A. Graniero, John Nole, Frank Soldano, and Frank Joseph Milozzo.

The District Court denied motions of the appellants for bail pending appeal.

On July 10, 1939, United States Circuit Court of Appeals for the Second Circuit ordered that the following-named defendants be admitted to bail pending the appeal: Salvatore Falcone, Joseph Falcone, and Henry Alberico. The motions for bail by the remaining appellants were denied by the Court.

On July 11, 1939, the defendants-appellants Salvatore Falcone, Joseph Falcone, and Henry Alberico were admitted to bail and are still at liberty upon bail.

On July 13, 1939, the District Court ordered that the time of the defendants-appellants Salvatore Falcone, Joseph Falcone, and Henry Alberico to file the assignments of errors and bill of exceptions be extended to and including November 1, 1939.

On August 22, 1939, the District Court ordered that the time of the defendants-appellants, John Melito, Salvatore A. Graniero,

Lawrence Grimaldi, John Nole, Nicholas Nole, Frank Sol-
11 dano, and Frank Milozzo be extended to file assignments of errors and bill of exceptions until November 1, 1939.

In United States District Court, Northern District of New York

Indictment

UNITED STATES OF AMERICA,
Northern District of New York.

In the District Court of the United States within and for the Northern District of New York at the term thereof held at Auburn, New York, in the month of October in the year of Our Lord, One thousand, Nine hundred and thirty-eight. Present: Hon. Frederick H. Bryant, Judge of said Court.

The Grand Jurors of the United States of America, duly empanelled, sworn, and charged to inquire within and for the Northern District of New York, upon their oaths and affirmations, do indict and present that Salvatore Falcone, Joseph Falcone, John Melito, Henry Alberico, John Ambroselli, Fred Apelian, Joseph Battaglia, George Blake, Nicholas Blase, George Bonanza, Joseph Bonanza, Sam Brown, alias Sam Barone.
12 Anthony Bruno, the name being fictitious, and the person intended to be designated being the person who rented premises situate at 58–60 North Genesee Street, Utica, New York, on or about December 1937.

Joseph Calabrese, Rocco Caruso, Michael Colombia, the said name being fictitious, and the person intended to be designated being the person in whose name a 1933 Ford two-door automobile, license number 2P–2249, was licensed and registered by the State of New York for 1938.

Joseph Coronato, Patrick DeRosa, Lorenzo DiCellio, Euegene Anthony DiFondi, Daniel DiJoseph, Ben Doe, the name being fictitious, the person intended to be designated being a person bearing the nickname of "Mussolini" and being one of the persons who operated and assisted in operating an illegal still on the Bortiatynski farm, so-called, at or near Lee Center, New York, during the month of January 1938.

Richard Doe, the said name being fictitious, the person intended to be designated being a person bearing the nickname "Mosey" and being the person who drove a truck carrying supplies to a certain illegal still situate on the Bortiatynski farm, so-called, at or near Lee Center, N. Y., during the month of
13 January 1938, and which also carried illegal alcohol from the said premises during the same period.

A. Donato, the name being fictitious and the person intended to be designated being the person who entered into a lease for premises situate on Frances Street, in the Town of New Hartford, N. Y., on September 1, 1938.

Joseph Enearl, the said name being fictitious, and the person intended to be designated being the person who applied for water service on or about the month of December 1937, for the premises situate at 910 Morris Street, Utica, New York.

Nick Fabrizio, Anthony Fagan, the name being fictitious, and the person intended to be designated being the person who leased from Sam Madonia, certain premises situated at No. 203–205 S. Charles Street, Rome, New York, in the latter part of July 1938.

Julia Falotico, Rocco Falotico, Enrico Ferro, alias Enrico Henry Garcia.

Salvatore A. Graniero, alias Fats Grande.

Anthony Gravina, Lawrence Grimaldi, alias Lorenzo Grimaldi.

Michael Kane, the name being fictitious, and the person intended to be designated being the person who entered into a lease for premises situate at 726 Catherine Street, Utica, N. Y., on or about July 19, 1937.

14 Paul Kiscel, the name being fictitious, the person intended to be designated being the person who rented premises at 726 Catherine Street, Utica, N. Y., some time during the month of October 1934.

John Koval, also known as John Kova, the name being fictitious, the person intended to be designated being the person who leased premises at 101 Clinton Street, Whitesboro, New York, on or about November 1, 1936.

Daniel LaBella, Filippo Lamonica, alias Joe Garruba.

Antonio Laratro, Ralph Lasondo, Dominick Luvera, Emil Maciol, Sam Madonia, Emmett Marrone, Vincent Marrone, Walter Melito, Frank Joseph Milozzo, Edoardo Mingo, the name being fictitious, and the person intended to be designated being the person who executed a lease for premises situate at 910 Morris Street, Utica, N. Y., on September 28, 1937.

Paul Mira, Frank Morino, Allie Morreale, alias "Meanie."

15 Salvatore Morreale, John Nole, Nicholas Nole, Natale Ormarso, Dominick Pangello, Joseph Pepetti, alias Joseph Salemo.

Elmer Pflanz, Dominick Pinto, the said name being fictitious and the person intended to be designated being the person in whose name a 1937 Terroplane automobile license number 3P–1977 was licensed and registered by the State of New York for 1937.

Peter Pizzuto, the name being fictitious and the person intended to be designated being the person who executed a lease for premises

at 632 Rosemount Place, Utica, New York, on or about March 15, 1934.

Joseph Sarcone, Charles John Skora, Frank Soldano, Frank Summa, the said name being fictitious and the person intended to be designated being the person who leased premises situate at 1166 Webster Avenue, Utica, N. Y., from Paolina Aiello by written lease dated December 27, 1937.

Frank Terra, the said name being fictitious and the person intended to be designated being the person who purchased certain property situate and known as 400 Railroad Street, Frankfort, New York, in the month of December 1936.

Peter Tocco, the name being fictitious and the person
16 intended to be designated being the person in whose name a Ford automobile bearing license plates 8P-8678 was registered by the State of New York, during the year 1937.

Frank Tretto, Frank Wheeler, the said name being fictitious, the person intended to be designated being a person who purchased certain property known as the Baldwin Milk Station, near Sherburne, New York, on or about February 25, 1937, hereinafter called the defendants, did violate Section 37 of the Criminal Code of the United States (18 U. S. C. A., section 88), against the peace and dignity of the United States of America, which crime was committed as follows:

The defendants at and within the counties of Onondaga, Chenango, Herkimer, Oneida, Clinton, Jefferson, Albany, and Oswego, State and Northern District of New York and within the jurisdiction of this court, and at other places within the Northern District of New York unknown to the Grand Jurors, during the period from on or about March 1st, 1933, up to and including October 4th, 1938, the exact times being unknown to the Grand Jurors, conspired together and with Vito Anello, Eugene Bonacci, Thomas Bonacci, Frank Bortiatynski, Steven Bortiatynski, Joseph Cannizzaro, Arthur Casona, Biaggio Collella, Frank Cosimeno, Simon Drost, Sam Grio, Peter Sabino, and Anthony Zappia, not indicted herein, whose names other than as herein stated are to the Grand Jurors unknown, and with divers other persons whose names are to the Grand Jurors unknown, to com-
mit offenses against the United States, namely, violations
17 of sections 1155f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated, the said conspiracy continuing in existence and operation until on or about October 5th, 1938.

The purposes of the defendants and such other persons in so conspiring and the objects of the conspiracy above described were: unlawfully, illegally, and knowingly to erect, possess, and operate illicit and unregistered stills and distilling apparatus; unlawfully,

illegally, and knowingly to manufacture. distill, sell, barter, solicit orders for, receive orders for, procure, deliver, possess, keep, store, transport, distribute, receive, and conceal distilled spirits, with the intent to defraud the United States of the taxes thereon, and to carry on the business of a distiller without giving bond and with intent to defraud the United States of the taxes on the distilled spirits to be distilled by the defendants and such other persons; unlawfully, illegally, and knowingly to purchase molasses, sugar, yeast, urea salt, tin cans, trucks, automobiles, stills, boilers, tanks, pumps, coolers, vats, barrels, and other materials and apparatus for the purpose of using the same in the unlawful and illegal manufacture, distribution, and transportation of distilled spirits; unlawfully, illegally, and knowingly to possess and have in their custody and under their control, illegal unregistered stills at various places within the Northern District of New York, without registering the same with and without notifying the Supervisor of the Alcohol Tax Unit, Internal Revenue Service, Treasury Department of the United States of the district wherein the said stills were found and set up, according to law; unlawfully, illegally, and knowingly to distill large quantities of distilled spirits and to engage and carry on the business of a distiller with intent to defraud the
18 United States of the tax on such distilled spirits, unlawfully, illegally, and knowingly to transport, purchase, sell, and transfer distilled spirits not having affixed to the immediate containers thereof, a stamp or stamps denoting the quantity of the distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such distilled spirits; unlawfully, illegally, and knowingly, to sell, buy, transfer, and transport such distilled spirits to various and sundry persons, to the Grand Jurors unknown, throughout the Northern District of New York and particularly the counties of Oneida, Herkimer, Chenango, Clinton, Onondaga, Jefferson, Albany, and Oswego, and at and to the counties of New York, Orange, and Cattaragus, State of New York, and at and to other places within the State of New York, unknown to the Grand Jurors, and at and to Chester, Pennsylvania and Clinton and Haverhill, Massachusetts, and at and to other places within the United States unknown to the Grand Jurors; unlawfully, illegally, and knowingly, to place and cause to be placed the said distilled spirits in five gallon containers and containers of other capacity at the aforesaid unregistered stills, the said containers to contain alcohol and distilled spirits which were to be distributed by means of trucks, automobile, and otherwise, to various illegal and illicit wholesale and retail dealers of alcohol, whiskey, and distilled spirits throughout the Northern District of New York and in the counties of New York, Orange, Cattaragus, New York State, and at other places within the State of New York

unknown to the Grand Jurors and at Chester, Pennsylvania, and Clinton and Haverhill, Massachusetts, and at other places within the United States unknown to the Grand Jurors; unlawfully, illegally, and knowingly, to remove and conceal the unlawfully manufactured distilled spirits with intend to defray the United States of the taxes imposed thereon; unlawfully, illegally, and knowingly to carry on the business of rectifiers and wholesale and retail liquor dealers without having paid the special taxes as required by the laws of the United States; unlawfully, illegally, and knowingly to lease and purchase various parcels of real property in the names of the defendants and their fellow conspirators, not indicted herein, and in fictitious names, within the counties of Chenango, Herkimer, and Oneida, State and Northern District of New York, and to erect on said premises and to outfit, possess, and maintain illegal and unregistered stills for the purposes of distilling distilled spirits.

After the formation of the aforesaid conspiracy and during the continuance thereof, the defendants and their co-conspirators herein named, but not indicted, did the following acts to effect the objects of such conspiracy and in pursuance thereof:

1. Thereafter and on or about March 15, 1934, the defendant Salvatore A. Graniero leased to Peter Pizzuto, the said name being fictitious, the true name being unknown to the Grand Jurors, certain premises known and described as 632 Rosemont Place, Utica, State and Northern District of New York, for the purpose of erecting and maintaining an illegal, unregistered still and illegal distillery on the said premises, the said defendant Salvatore A. Graniero then and there well knowing that he was leasing the said premises for that purpose.

2. Thereafter on or about April 28, 1934, the defendants Frank Soldano and Joseph Calabrese were in possession of and operating an illicit and unregistered still and illegal distillery on the aforesaid premises, 632 Rosemont Place, Utica, State and Northern District of New York.

3. Thereafter and during the months of January, February, March, and April 1937, the defendants Paul Mira and Lorenzo DiCellio, were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on premises situate and known as 1934 Beechgrove Place, Utica, State and Northern District of New York.

4. Thereafter and on or about February 25, 1937, the defendant Frank Wheeler, the name being fictitious, the true name being unknown, purchased certain premises from one John Newman, consisting of a milk station, known and described as the Baldwin Milk Station, so-called, near Sherburne, State and Northern District of New York, for the purpose of erecting and maintaining

an unregistered still and illicit distillery on the said premises and at or about the same time, rented from the said John Newman, a vacant farmhouse nearby, known as the Bartlett House, to be used as sleeping quarters for the persons who were operating and maintaining the said unregistered still and distillery.

5. Thereafter and on or about March 9th, 1937, the defendant Nicholas Blase transported sugar and cans for the purposes of said illicit unregistered still and the operation of the said illicit distillery.

6. Thereafter and on or about March 10th, 1937, the defendants Dominick Pangello, Anthony Zappia, Enrico Ferro, and Eugene Anthony DiFondi were in possession of and operating the said unregistered and illegal still and illicit and unregistered distillery on the said premises known and described as the
21 Baldwin Milk Station, so-called, near Sherburne, State and Northern District of New York.

7. Thereafter and on or about April 14, 1937, the defendants Lawrence Grimaldi, Sam Brown, Joseph Garruba, and Frank Morino were in possession of and operating an illicit and unregistered still and illicit and illegal distillery at premises situate and known as 1605 Girard Avenue, Utica, State and Northern District of New York.

8. Thereafter and during the month of July 1937, the defendants Enrico Ferro, Daniel DiJoseph, Nicholas Blase, Daniel DiBella, and John Ambroselli were in possession of and operating an illicit and unregistered still and illicit and unregistered distillery on premises situate at or near Schuyler Corners, State and Northern District of New York.

9. Thereafter and on or about July 14, 1937, the defendant Ralph Lasondo, the name being fictitious, the true name being unknown to the Grand Jurors, purchased from Mrs. John Kinney certain premises known and described as the Jones Farm, so-called, in the Town of Remsen, New York, near Russia, State and Northern District of New York, for the purpose of erecting and maintaining an illegal, unregistered still and illegal distillery on the said premises.

10. Thereafter and during the month of August 1937, the defendants, George Bonanza, Joseph Bonanza, Elmer Pflanz, Joseph Sarcone, Frank Soldano, Natalie Ormarso, Joseph Pepetti, and Frank Tretto were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on the
22 premises of the aforesaid Jones Farm, so-called, in the Town of Remsen, near Russia, State and Northern District of New York.

11. Thereafter and during the months of July and August 1937, the defendant Nicholas Nole, at Syracuse and Utica, State and

Northern District of New York, sold large quantities of yeast to George Bonanza, Joseph Bonanza, Elmer Pflanz, Joseph Sarcone, Frank Soldano, Natalie Ormarso, Joseph Pepetti, and Frank Tretto and to other co-conspirators whose names are unknown to the Grand Jurors, for use in connection with the maintenance and operation of the illicit and unregistered still and illicit and unregistered distillery at the Jones Farm, so-called, in the Town of Remsen, New York, near Russia, State and Northern District of New York, the said Nicholas Nole then and there knowing that he was selling the said yeast for use in connection with the maintenance and operation of the aforesaid illegal unregistered still and illicit distillery, and for the illegal manufacture of distilled spirits.

12. Thereafter and on or about November 27, 1937, at or near Utica, New York, on the state highway between Watertown and Utica, State and Northern District of New York, the defendant Rocco Caruso transported a quantity of illegally distilled alcohol in a truck, which alcohol did not have affixed thereto, to the immediate container thereof, stamp or stamps denoting the quantity of said said alcohol and evidencing payment of Internal Revenue taxes imposed on such alcohol by the laws of the United States.

13. Thereafter and on about December 27, 1937, the defendant Frank Summa, the name being fictitious, the true name being unknown, leased from Mrs. Paolina Aiello certain premises
23 situate and known as 1166 Webster Avenue, Utica, State and Northern District of New York, for the purpose of erecting and maintaining an illegal, unregistered still and illegal distillery on the said premises.

14. Thereafter and during the month of January 1938 the defendants, Lawrence Grimaldi, Rocco Falotico, Julia Falotico, and Patrick DeRosa, were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on said premises situate and known as 1166 Webster Avenue, Utica, State and Northern District of New York.

15. Thereafter and during the month of January 1938 the defendant, Daniel DiJoseph, was in possession of and operating an illicit and unregistered still and illicit and illegal distillery on premises known as the Bortiatynski Farm at or near Lee Center, State and Northern District of New York.

16. Thereafter and during the month of March 1938 the defendants, George Blake, Salvatore Morreale, Frank Joseph Milozzo, Vincent Marrone, and Emmett Marrone were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on premises situate and known as 29 Whitesboro Street, Utica, State and Northern District of New York.

17. Thereafter and during the months of March to July 1938, both dates inclusive, the exact times being unknown to the Grand

Jurors, Nicholas Blase maintained and operated an illicit and unregistered still and illicit and illegal distillery at premises situate and known as 3 Sauquoit Street, Whitesboro, State and Northern District of New York.

18. Thereafter and during the months of July and August 1938 the defendant, Anthony Fagan, the name being fictitious, the true name being unknown to the Grand Jurors, leased premises from Sam Madonia for an illicit and unregistered still and illicit distillery, the said premises being situate and known as 203–205 South Charles Street, Rome, State and Northern District of New York, the said Sam Madonia then and there knowing that the said premises would be used for that purpose.

19. Thereafter and during the months of July and August 1938 the exact dates unknown to the Grand Jurors, the defendants, George Bonanza, Joseph Bonanza, and Fred Apelian, were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on premises situate and known as 203–205 South Charles Street, Rome, State and Northern District of New York.

20. Thereafter and on or about August 5th, 1938, at Rome, State and Northern District of New York, the defendant, George Bonanza, transported a quantity of illegally distilled alcohol in an automobile, which alcohol was distilled at the unregistered still described in paragraph marked "19" which alcohol did not have affixed thereto, to the immediate container thereof, stamp or stamps denoting the quantity of said alcohol and evidencing payment of Internal Revenue taxes imposed on such alcohol by the laws of the United States.

21. Thereafter and during the period from October 1st to October 4th, 1938, both dates inclusive, the defendants, Frank Joseph Milozzo and Charles John Skora, were in possession of and operating an illicit and unregistered still and illicit and illegal distillery on premises on Francis Avenue, New Hartford, State and Northern District of New York, owned by one Bagglio Collella.

22. Thereafter and at various times during the years 1936, 1937, and 1938, the exact times being unknown to the Grand Jurors, in the counties of Herkimer, Oneida, and Chenango, within the Northern District of New York, the exact places being to the Grand Jurors unknown, the defendant Nicholas Nole sold large quantities of yeast to the other defendants named herein and to the other conspirators named herein, but not indicted, and to divers other persons who were fellow conspirators but whose names are unknown to the Grand Jurors, for use in maintaining and operating illegal and unregistered stills and illegal and illicit distilleries, and for the illegal manufacture of distilled spirits in

the Northern District of New York, the said Nicholas Nole then and there knowing at the times of such sales of yeast, that the same was to be and would be used in the operation and maintenance of illicit and unregistered stills and illicit and unregistered distilleries and for the illegal manufacture of distilled spirits.

23. Thereafter and at various times during the years 1937 and 1938, the exact times being unknown to the Grand Jurors, in the counties of Herkimer, Oneida, and Chenango, within the Northern District of New York, the exact places being to the Grand Jurors unknown, the defendant John Nole sold large quantities of yeast to the other defendants named herein and to the other conspirators named herein, but not indicted and to divers other persons who were fellow conspirators but whose names are unknown to the Grand Jurors, for use in maintaining and operating illegal and unregistered stills and illegal and illicit distilleries and for
26 the illegal manufacture of distilled spirits in the Northern District of New York, the said John Nole then and there knowing at the times of such sales of yeast, that the said yeast was to be and would be used in the operation and maintenance of illicit and unregistered stills and illicit and unregistered distilleries and for the illegal manufacture of distilled spirits.

24. Thereafter and at various times during the years 1937 and 1938, the exact times being unknown to the Grand Jurors, in the counties of Chenango, Herkimer, and Oneida, in the Northern District of New York, the exact places being to the Grand Jurors unknown, the defendant Henry Alberico sold large quantities of sugar to the other defendants named herein and to the other conspirators named herein, but not indicted, and to divers other persons who were fellow conspirators but whose names are unknown to the Grand Jurors for use in maintaining and operating illegal and unregistered stills and illegal and unregistered distilleries and for the illegal manufacture of distilled spirits in the Northern District of New York, the said Henry Alberico then and there knowing at the times of said sales of sugar, that such sugar was to be used and would be used in the operation and maintenance of illicit and unregistered stills and illicit and illegal distilleries and for the illegal manufacture of distilled spirits.

25. Thereafter and at various times during the years 1937 and 1938, the exact times being unknown to the Grand Jurors in the counties of Chenango, Herkimer, and Oneida, in the Northern District of New York, the exact places being to the Grand Jurors unknown, the defendant Henry Alberico sold large quan'ties of five-gallon tin cans to the other defendants named herein and to the other conspirators named herein but not indicted, and
27 to divers other persons who were fellow conspirators but whose names are unknown to the Grand Jurors for use in

maintaining and operating illegal and unregistered stills and illegal and unregistered distilleries and for the illegal manufacture of distilled spirits in the Northern District of New York and for the illegal transportation of distilled spirits, the said Henry Alberico then and there knowing at the times of said sales of five-gallon tin cans that such cans were to be used and would be used in the operation and maintenance of illict and unregistered stills and illicit and illegal distilleries and for the illegal transportation of distilled spirits.

WILLIAM J. LONG,
Foreman of the Grand Jury.
RALPH L. EMMONS,
United States Attorney in and for the Northern District of New York.

28 In United States District Court

Docket 28060. Criminal Docket

Docket entries

THE UNITED STATES

vs.

SALVATORE FALCONE; JOSEPH FALCONE; JOHN MELITO; HENRY ALBERICO; JOHN AMBROSELLI; FRED APELIAN; JOSEPH BATTAGLIA; GEORGE BLAKE; NICHOLAS BLASE; GEORGE BONANZA; JOSEPH BONANZA; SAM BROWN ALIAS SAM BARONE; ANTHONY BRUNO, NAME BEING FICTITIOUS, ETC.; JOSEPH CALABRESE; ROCCO CARUSO; MICHAEL COLOMBIA, NAME BEING FICTITIOUS, ETC.; JOSEPH CORONATO; PATRICK DE ROSA; LORENZO DI CELLIO; EUGENE ANTHONY DI FONDI; DANIEL DI JOSEPH; BEN DOE, NAME BEING FICTITIOUS, ETC.; RICHARD DOE, NAME BEING FICTITIOUS, ETC.; A DONATO, NAME BEING FICTITIOUS, ETC.; JOSEPH ENEARL, NAME BEING FICTITIOUS, ETC.; NICK FABRIZIO; ANTHONY FAGAN, NAME BEING FICTITIOUS, ETC.; JULIA FALOTICO; ROCCO FALOTICO; ENRICO FERRO ALIAS ENRICO HENRY GARCEA; SALVATORE A. GRANIERO, ALIAS FATS GRANDE; ANTHONY GRAVINA; LAWRENCE GRIMALDI ALIAS LORENZO GRIMALDI; MICHAEL KANE, NAME BEING FICTITIOUS, ETC.; PAUL KISCEL, NAME BEING FICTITIOUS, ETC.; JOHN KOVAL, NAME BEING FICTITIOUS, ETC.; DANIEL
29 LA BELLE, FILIPPO LAMONICA ALIAS JOE GARRUBA; ANTONIO LARATRO; RALPH LASONDO; DOMINICK LUVERA; EMIL MACIOL; SAM MADONIA; EMMETT MARRONE; VINCENT MARRONE; WALTER MELITO; FRANK JOSEPH MILOZZO; EDOARDO

MINGO, NAME BEING FICTITIOUS, ETC.; PAUL MIRA; FRANK MORINO; ALLIE MORREALE ALIAS "MEANIE"; SALVATORE MORREALE; JOHN NOLE; NICHOLAS NOLE; NATALE ORMARSO; DOMINICK PANGELLO; JOSEPH PEPETTI, ALIAS JOSEPH SAMELO; ELMER PFLANZ; DOMINICK PINTO, NAME BEING FICTITIOUS, ETC.; PETER PIZZUTO, NAME BEING FICTITIOUS, ETC.; JOSEPH SARCONE; CHARLES JOHN SKORA; FRANK SOLDANO; FRANK SUMMA, NAME BEING FICTITIOUS, ETC.; FRANK TERRA, NAME BEING FICTITIOUS, ETC.; PETER TOCCO, NAME BEING FICTITIOUS, ETC.; FRANK TRETTO; FRANK WHEELER, NAME BEING FICTITIOUS, ETC., DEFENDANTS

Allie Morreale—states correct name Dominick Morreale.
Joseph Pepetti—states correct name Joseph Zapetti.

ATTORNEYS

For U. S.: Ralph L. Emmons, David D. Joselit.
For Defts. Salvatore & Joseph Falcone—Daniel H. Prior.
For Defts. John & Walter Melito—Rocco Mascaro.
For Defts. Henry Alberico & Enrico Ferro—Jack J. Danella.
For Deft. Jos. Battaglia—John Tomaney.
For Defts. George Bonanza, Salvatore A. Graniero, and Nicholas Nole—Richard P. Byrne.
For Deft. Sam Browne—Smith Johnson.
For Deft Sam Madonia—Searl & Searl.
For Defts. Elmer Pflanz & Joseph Sarcone—Burt Lockwood, by assignment.
For Deft. Frank Tretto—Roger O. Baldwin.
The following assigned by the Court:
For Deft. Blase—Paul L. Matt.
For Deft. Calabrese—William L. Broad.
For Deft. Caruso—Joseph Rogers.
For Deft. DeRosa—Joseph Rogers.
For Deft. DeCellio—William L. Broad.
For Deft. DiFondi—Charles Schoeneck.
For Deft. DiJoseph—Charles Schoneneck.
For Deft. Fabrizio—Joseph Rogers.
For Defts. Julia & Rocco Falotico—Joseph Rogers.
For Deft. Gravina—Gerald Parkinson.
For Deft. Grimaldi—Charles Keene.
For Deft. LaBella—Anthony Smith.
For Deft. Lamonica—Paul Shea, Wm. J. Ryan.
For Deft. Maciol—Gerald Parkinson.
For Deft. Emmett Marrone—Arnold A. Dettor.
For Deft. Milozzo—Arnold A. Dettor.
For Deft. Mira—Joseph Furcinito.

For Deft. Morino—Arnold A. Dettor.
For Defts. Salvatore & Dominick Morreale—Arnold A. Dettor.
For Deft. John Nole—Richard P. Byrne.
For Deft. Ormarso—Burt Lockwood.
For Deft. Zapetti—Burt Lockwood.
For Deft. Skora—Roger O. Baldwin.
For Deft. Soldano—Roger O. Baldwin.
For Defts. John & Walter Melito—Stanley Bliss.
For Deft. Grimaldi—Irving K. Baxter.

31 1938

Oct. 26—Filed Indictment. Viol. Sec. 37 C. C. Conspiracy to violate Int. Rev. Laws. 3/1/33—10/5/38.

1939

Jan. 9—Entd. order opening Indictment.
" "—Entd. order for issuance of general capiases.
" 10—Issued 27 capiases, as ordered, with bail as follows: Salvatore Falcone—$20,000; Joseph Falcone—$15,000; Henry Alberico—$5,000; John Ambroselli—$1,000; Fred Apelian—$2,500; Joseph Battaglia—$2,500; George Blake—$1,000; Nicholas Blase—$2,500; George Bonanza—$5,000; Joseph Bonanza—$5,000; Sam Brown—$1,000; Anthony Bruno—no bail; Joseph Calabrese—$1,000; Rocco Caruso—$2,500; Joseph Coronato—$1,000; Patrick Derosa—$2,000; Lorenzo Dicellio—$1,000; Eugene A. Difondi—$1,000; Daniel DiJoseph—$2,000; Julia Falotico—$1,000; Rocco Falotico—$2,000; Nick Fabrizio—$1,000; Enrico Ferro—$5,000; Salvatore Graniero—$7,500; Anthony Gravina—$1,500; Lawrence Grimaldi—$2,500; aniel LaBella—$1,000.00.
" 11—Issued 23 capiases, as ordered, with bail as follows: Filippo Lamonica—$1,000; Dominick Luvera—$1,500; Emil Maciol—$1,500; Sam Madonia—$1,500; Emmett Marrone—$2,000; Vincent Marrone—$2,000; John Melito—$10,000; Walter Melito—$3,000; Frank J. Milozzo—$5,000; Paul Mira—$5,000; Frank Morino—$1,000; Allie Morreale—$2,000; Salva-
32 tore Morreale—$5,000; John Nole—$2,000; Nicholas Nole—$7,500; Natale Ormarso—$1,500; Dominick Pangello—$1,500; Joseph Pepetti—$1,500; Elmer Pflanz—$1,500; Joseph Sarcone—$1,500; Charles J. Skora—$1,500; Frank Soldano—$1,500; Frank Tretto—$1,500.00.
" 14—Filed capias for deft. Pangello, retd. unexecuted (copy to U. S. Atty.).

1939

Jan. 16—Filed bonds for defts. S. Falcone, J. Battaglia, G. Bonanza, J. Bonanza, J. Calabrese, R. Caruso, L. DiCellio, E. DiFonda, J. Falotico, R. Falatico, N. Fabrizio, E. Ferro (Garcia), S. Graniero, L. Grimaldi, D. LaBella, H. Alberico, D. Luvera, V. Marrone, J. Melito, W. Melito, J. Nole, N. Nole, N. Ormarso, E. Pflanz, & Chas. Skora.

" 17—Filed bonds for defts. Sam Brown, P. DeRosa, A. Gravina, Phillip Lamonica, E. Maciol, S. Madonia, S. Morreale & Jos. Zapetti (Pepetti).

Jan. 18—Filed capiases for defts. S. Graniero, Dicellio, Caruso, J. Battaglia & H. Alberico, each served Jan. 11; for defts. DiJoseph & Tretto, served Jan. 12; for defts. Rocco Falotico, served Jan. 13; & for defts. Gravina, Lamonica, DeRosa & Blake, each served Jan. 16.

Jan. 19—Filed capiases for defts. Blase, George & Joseph Bonanza, DiFondi, Fabrizio, Julia Falotico, Ferro, Grimaldi, & LaBella, each served Jan. 11; for defts. Salvatore Falcone, V. Marrone, John Melito, Walter Melito, Frank Morino, Salvatore Morreale,
33 John Nole, & Joseph Pepetti, each served Jan. 12; for defts. Madonia, Luverva, Brown, Ormarso & Pflanz, each served Jan. 13; for defts. Calabrese, Mira, Nicholas Nole, Sarcone, Skora, & Soldano, each served Jan. 14; & for deft. Maciol, served Jan. 16.

" 21—Filed capias for deft. Apelian, redt. unexecuted (copy to U. S. Atty.)

" 23—Filed bonds for defts. Blase & Mira.

" 24—Filed bond for deft. Sarcone.

" 25—Filed bond for deft. Joseph Falcone.

" 26—Filed bond for deft. Soldano.

" "—Filed capias for deft. Emmett Marrone, served Jan. 20; for deft. Frank Milozzo, served Jan. 21; & for deft. Joseph Falcone, served Jan. 24.

" 28—Filed capias for deft. Allie Morreale, served Jan. 27.

" 30—Filed bond for deft. Dominick Morreale.

" 31—Filed bonds for defts. Emmett Marrone & Frank Tretto.

Feb. 13—Defts. DiJoseph, Milozzo & Morino arraigned—each not guilty. Defts. remanded to custody of Marshal.

" "—Defts. S. & Jos. Falcone, John Melito, Alberico, Battaglia, George Bonanza, Brown, Ferro, Graniero, Madonia, Walter Melito, N. Nole, Pflanz, Sarcone & Tretto arr'igned—each not guilty. Bail continued; ten days to demur & make motions.

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1939

Feb. 13—Defts. Blase, Calabrese, Joseph Bonanza, Caruso,
34 DeRosa, DiCellio, DiFondi, Fabrizio, Julia & Rocco Falotico, Gravina, Grimaldi, LaBella, Lamonica, Luvera, Maciol, Emmett & Vincent Marrone, Mira, Allie correct name Dominick Morreale, Salvatore Morreale, John Nole, Ormarso, Joseph Pepetti correct name Zapetti, Skora & Soldano arraigned—each not guilty. Bail continued.

" "—Deft. Blake arraigned—not guilty. Released on own recognizance.

Mar. 13—Filed pet. & notice of motion, in behalf of defts. John and Walter Melito.

" "—Filed & entd. order denying motion for bill of particulars, as to defts. John & Walter Melito.

" 27—Filed & entd. order denying motion for bill of particulars, as to defts. Salvatore & Joseph Falcone.

" 31—Filed bond for deft. Coronato.

Apr. 3—Filed capias for deft. Coronato, served Mar. 29.

" 10—Filed bond for deft. Frank Milozzo—$1,000.

" 12—Filed bond for deft. Pangello—$500.

" 26—Filed pet. & Order & entd. order for writ of habeas corpus ad prosequendum, for Fred Apelian.

" "—Issued writ, returnable May 8, 1939, at Syracuse, N. Y. & del'd. to Marshal.

May 8—Deft. Joseph Coronato states his correct name to be Coromato.

" "—Defts. Fred Apelian, Joseph Coromato, & Dominick Pangello arraigned, and deft. Apelian pleads guilty. Sentence deferred. Others not guilty—bail continued.

May 9—Deft. Sam Brown states his correct name to be
35 Sam Barone, & withdraws plea & pleads guilty. Sentence deferred & bail continued.

May "—Deft. George Blake withdraws plea & pleads guilty. Sentence deferred, & deft. released on his own recognizance.

" "—Entd. order granting severance as to deft. Salvatore Morreale, on motion of Mr. Joselit.

" 10—Deft. Lamonica withdraws plea & pleads guilty. Sentence defered & bail continued.

" "—Deft. Morino withdraws plea & pleads guilty. Sentence deferred, & deft. remanded to custody of Marshal.

" "—Trial of Indictment moved by U. S. Attorney against defts. Salvatore & Joseph Falcone, John Melito, Henry Alberico, Jos. Battaglia, Nicholas Blase, George & Joseph Bonanza, Joseph Calabrese, Rocco Caruso, Joseph Coromato, Patrick Derosa, Lorenzo

Dicellio, Eugene A. Difondi, Daniel DiJoseph, Nick Fabrizio, Julia & Rocco Falotico, Enrico Ferro, Salvatore A. Graniero, Anthony Gravina, Lawrence Grimaldi, Daniel LaBelle, Dominick Luvera, Emil Maciol, Sam Madonia, Emmett & Vincent Marrone, Walter Melito, Frank Jos. Milozzo, Paul Mira, Dominick Morreale, John & Nicholas Nole, Natale Ormarso, Dominick Pangello, Joseph Zapetti, Elmer Pflanz, Joseph Sarcone, Charles John Skora, Frank Soldano & Frank Tretto; Jury drawn & sworn, also two alternate jurors.

1939

May 11—Filed & entd. order for examination of deft. Salvatore Morreale by physician.

36 May 11—Trial continued.

" 12—Trial continued.

May 12—Entd. order directing that witness Joseph Cannizzaro be held at a material witness in the amount of $1,000 bail, & in default thereof witness committed to custody of Marshal.

" 15-19—Trial continued.

" 22—Filed order committing witness to custody, executed May 12.

" 22-26—Trial continued.

" 31—Trial continued.

June 1—Trial continued; deft. Joseph Sarcone surrendered on cash-bond by his surety, & released on property bond previously filed.

June 2—Trial continued.

" "—Filed cert. copy of search warrant; deft. Grimaldi's Ex. B.—Identification.

" "—Filed pet. for bill of particulars & motion to quash re: Grimaldi.

" 5-6—Trial continued.

" 7—Trial continued. On motion of Mr. Joselit, Indictment is dismissed as to defts. Joseph Calabrese, Joseph Coromato, Julia Falotico, Nick Fabrizio, Anthony Gravina, Emil Macio, & Sam Madonia. Defts. discharged & their bonds exonerated.

" "—Entd. order for general capias for deft. Apelian, & issued same. Bail—$1,000.00.

" 8—Trial continued. On motion of Jerome Searl, a severance is granted as to deft. DiJoseph, & his bail is reduced to $500.00. On motion of attorneys for the

37 defts., Indictment is dismissed as to defts. Dominick Luvera, Frank Tretto, Rocco Falotico, Patrick DeRosa, Dominick Pangello, Eugene Anthony DiFondi,

Lorenzo DiCellio, Natale Ormarso & Joseph Sarcone. Defts. discharged & their bail exonerated.

1939

June 8—Filed & entd. order for return of cash-bail.

" 9—Trial continued. Deft. Elmer Pflanz withdrew plea & plead guilty. Sentence deferred & bail continued.

" 12-13—Trial continued.

" 14—Filed copy of writ of habeas corpus for deft. Fred Apelian, executed May 8, 1939.

"15-16-17—Trial continued.

" 17—The Jurors find the following defendants guilty, as charged: Henry Alberico, Nicholas Blase, George Bonanza, Joseph Bonanza, Rocco Caruso, Joseph Falcone, Salvatore Falcone, Enrico Ferro, Salvatore A. Graniero, Lawrence Grimaldi, Daniel Labella, Emmett Marrone, John Melito, Walter Melito, Frank Joseph Milozzo, Paul Mira, Dominick Morreale, John Nole, Nicholas Nole, Charles John Skora, & Frank Soldano; and the following defendants not guilty—Joseph Battaglia, Vincent Marrone & Joseph Zapetti. Defts. Battaglia, Zapetti & Vincent Marrone discharged & their bonds exonerated. All sentences are deferred to June 27, 1939, at 10:00 A. M. at Syracuse; bail continued as to all defts.

" 20—Filed capiases as to defts. Bruno & Ambroselli, retd. unexecuted.

38 June 22—Filed & entd. order to pay detained witness Joseph Cannizzaro, & directing Marshal to execute capias in his possession.

" 27—Entd. sentence that deft. Salvatore Falcone be confined in any Institution designated by the Attorney General for one year & five months & pay a fine of $6,000 & stand committed until paid.

" "—Entd. sentence that deft. Joseph Falcone be confined in any Institution designated by the Attorney General for two years & pay a fine of $7,500 & stand committed until paid.

" "—Entd. sentence that deft. John Melito be confined in any Institution designated by the Attorney General for one year & one day & pay a fine of $1,000 & stand committed until paid.

" "—Entd. sentence that deft. Henry Alberico be confined in any Institution designated by the Attorney General for one year & one day & pay a fine of $3,000 & stand committed until paid.

1939

June 27—Entd. sentence that deft. Fred Apelian be confined in any Institution designated by the Attorney General for one year & one day.

" "—Entd. sentence that deft. Nicholas Blase be confined in the Oneida Co. Jail for six months.

" "—Entd. sentence that deft. George Bonanza be confined in any Institution designated by the Attorney General for one year & one day.

" "—Entd. sentence that deft. Joseph Bonanza be confined in the Oneida Co. Jail for four months.

39 " "—Entd. sentence that deft. Sam Barone be confined in the U. S. Pen. at Lewisburg, Pa. for two years; execution of sentence suspended for two years & eight months & deft. to be on probation.

" "—Entd. sentence that deft. Rocco Caruso be confined in the U. S. Pen. at Lewisburg, Pa., for one year & one day; execution of sentence suspended for four years & deft. to be on probation.

" "—Entd. sentence that deft. Enrico Ferro (correct name Enrico Henry Garcea) be confined in the U. S. Pen. at Lewisburg, Pa., for two years; execution of sentence suspended for five years & deft. to be on probation.

" "—Entd. sentence that deft. Salvatore A. Graniero be confined in any Institution designated by the Attorney General for two years.

" "—Entd. sentence that deft. Lawrence Grimaldi be confined in any Institution designated by the Attorney General for one year & eight months.

" "—Entd. sentence that deft. Daniel Labella be confined in the U. S. Pen. at Lewisburg, Pa., for one year & ten months; execution of the sentence suspended for four years & deft. to be on probation.

" "—Entd. sentence that deft. Lamonica be confined in the U. S. Pen. at Lewisburg, Pa., for one year & two months; execution of sentence suspended for three years & six months & deft. to be on probation.

40 " " Entd. sentence that deft. Emmett Marrone be confined in the Oneida Co. Jail for six months; execution of sentence to be suspended for three years & deft. to be on probation.

" "—Entd. sentence that deft. Walter Melito be confined in the U. S. Pen. at Lewisburg, Pa., for two years; execution of sentence suspended for five years & deft. to be on probation.

1939

June 27—Entd. sentence that deft. Frank Joseph Milozzo be confined in any Institution designated by the Attorney General for one year & three months.

" "—Entd. sentence that deft. Paul Mira be confined in the U. S. Pen. at Lewisburg, Pa., for two years; execution of sentence suspended for four years & deft. to be on probation.

June 27—Entd. sentence that deft. Frank Morino be confined in the U. S. Pen. at Lewisburg, Pa., for two years; execution of sentence suspended for four years & deft. to be on probation. In case probation is violated, sentence is to run concurrently with sentence imposed in case #27657.

" "—Entd. sentence that deft. Dominick Morreale be confined in the U. S. Pen. at Lewisburg, Pa., for one year & six months; execution of sentence suspended for four years & deft. to be on probation.

" "—Entd. sentence that deft. John Nole be confined in any Institution designated by the Attorney General for one year & five months & pay a fine of $2,000 & stand committed until paid.

41 " "—Entd. sentence that deft. Nicholas Nole be confined in any Institution designated by the Attorney General for two years.

" "—Entd. sentence that deft. Elmer Pflanz be confined in the U. S. Penitentiary at Lewisburg, Pa., for two years; execution of sentence suspended for five years & deft. to be on probation.

" "—Entd. sentence that deft. Charles John Skora be confined in the U. S. Pen. at Lewisburg, Pa., for two years; execution of sentence suspended for four years, & deft. to be on probation.

" "—Entd. sentence that deft. Frank Soldano be confined in any Institution designated by the Attorney General for one year & four months.

" "—Filed & entd. 26 judgments.

" "—All motions for bail pending appeal are denied.

" "—Filed notice of appeal for deft. John Melito.

" "—Filed notice of appeal for deft. Henry Alberico.

" "—Filed notice of appeal for deft. Joseph Falcone.

" "—Filed notice of appeal for deft. Salvatore Falcone.

" 28—Filed notice of appeal for defts. Lawrence Grimaldi, Nicholas Nole, Salvatore A. Graniero, John Nole, Frank Soldano, & Frank Joseph Milozzo.

1939

June 29—Forwarded duplicate notices of appeal and statements from docket entries to Clerk, C. C. A.

" "—Issued commitments for defts. Salvatore & Joseph
42 Falcone, John Melito, Henry Alberico, Fred Apelian, Nicholas Blase, George Bonanza, John Bonanza, Salvatore A. Graniero, Lawrence Grimaldi, Frank J. Milozzo, John Nole, Nicholas Nole, & Frank Soldano.

July 5—Filed commitments for defts. Joseph Bonanza & Nicholas Blase, executed June 27.

" 7—Filed withdrawal of abandonment of appeal as to deft. John Melito.

" 10—Filed capias for deft. Apelian, served June 10.

" "—Filed commitments for defts. Apelian & George Bonanza, each executed July 6.

" "—Filed bonds for defts. Salvatore & Joseph Falcone, Henry Alberico, Salvatore Graniero, Lawrence Grimaldi, Frank Milozzo, Nicholas & John Nole, & Frank Soldano, pending determination on application for bail pending appeal.

" 12—Filed bonds on appeal for defts. Salvatore & Joseph Falcone & Henry Alberico.

" 13—Filed affdt. & order & entd. order allowing deft. Alberico to leave the Dist. for a limited time.

" "—Filed affdt. & order extending time to file—for defts. Falcone & Alberico.

July 15—Filed cert. copy of order of Circuit Court allowing bail pending appeal for defts. S. & J. Falcone & Alberico, & denying applications as to defts. remaining.

" 19—Filed copy of order C. C. A. with return of Marshal, committing defts. as directed.

" "—Filed election to begin service of sentence—deft. Graniero.

43 " 20—Filed election to begin service of sentence—defts. John & Nicholas Noble & John Melito.

July 21—Filed election to begin service of sentence—defts. Soldano & Milozzo.

Aug. 4—Filed commitments for defts. Milozzo, John Nole, & John Melito, executed July 27.

" " —Filed notice of Court to settle record.

" 11—Filed affdt. & order & entd. order allowing deft. Salvatore Falcone to leave jurisdiction of this Court during stated period.

" 16—Filed notice withdrawing appeal as to John Melito, dated June 30, 1939.

1939

Aug. 16—Filed stipulation of U. S. Attorney dismissing appeal as to John Melito, dated Jul. 5, 1939.

" 22—Filed & entd. order of Judge Bryant extending April term ninety days, & extending time to file bill of exceptions, etc.

A true copy. Aug. 26, 1939.

Attest:

[SEAL]

G. A. PORTER,
Clerk, U. S. Dist. Court.

44 In United States District Court—Northern District of New York

[Title omitted.]

Motion for bill of particulars on behalf of Joseph and Salvatore Falcone

Upon reading and filing the affidavit of Daniel H. Prior, sworn to the 23rd day of February 1939, and upon all the papers and proceedings herein, let the United States Attorney for the Northern District of New York show cause before this Court at a Term thereof, appointed to be held at the Federal Building in the City of Albany, New York, in the Northern District of New York on the 4th day of March 1939, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made requiring the said United States Attorney to furnish to the defendants above named the following particulars of the charge against them as set forth in the indictment herein:

1. Will the Government contend that these defendants actually entered into a conspiracy with all of the defendants named or any other persons named in the indictment and not indicted? If not, with which one or ones of these persons will it be contended the defendants actually conspired?

45 2. At what precise time will it be contended either or both of these defendants entered into the conspiracy charged? If the precise time cannot be named, then at what approximate time?

3. What act or acts will it be contended that either of these defendants did as part of the conspiracy or in furtherance of the conspiracy and when and where were the acts committed?

4. Will it be contended that these defendants personally committed any act or acts in pursuance of the conspiracy? If so, when and where were the acts committed? What were the acts?

Service of this order upon the United States Attorney for the Northern District of New York either personally or in the manner provided by rule and statute for service of papers upon an attorney including service by mail on February 23, 1939, shall be due and sufficient service thereof.

FRANK COOPER,
United States District Judge.

Dated, Albany, New York, February 23, 1939.

46 United States District Court—Northern District of New York

[Title omitted.]

Affidavit of Daniel H. Prior

Daniel H. Prior, being duly sworn, deposes and says: That he is an attorney and counselor at law, duly admitted to practice as such in all the Courts of the State of New York and in the United States District Court for the Northern District of New York. Deponent is attorney for the defendants, Salvatore Falcone and Joseph Falcone in this action and above named.

This is a criminal action, instituted by the finding of an indictment at a term of this Court held at Auburn, New York, in October 1938. The indictment names sixty-eight defendants and charges a violation of section 37 of the Criminal Code of the United States (18 U. S. C. A., section 88) which is the crime of conspiracy.

The defendants above named were arraigned at a term of this Court held at Syracuse, New York, on February 13, 1939, and each of them pleaded not guilty. No further proceedings have been had upon the indictment.

47 The indictment names thirteen other persons as parties to the conspiracy, none of those persons being mentioned as defendants in the indictment.

The indictment charges that the defendants conspired to commit violations of sections 1155 f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a, of Title 26, United States Code Annotated.

In brief, it charges the purposes of the conspiracy to erect stills and carry on the business of a distiller without giving bond and with intent to defraud the United States of taxes and to purchase materials for the building and maintenance of stills, for the carrying on of the distilling business and for the sale and distribution of products of the distilling business. The indict-

ment, which is a record of this Court, is hereby referred to for a more particular and a full description of the crime charged.

The indictment charges the commission of twenty-five overt acts in pursuance of the conspiracy. It does not charge any overt act on the part of either of the defendants above named. It charges the places where the crime was committed to be throughout the Northern District of New York and particularly the Counties of Oneida, Herkimer, Chenango, Clinton, Onondaga, Jefferson, Albany, Oswego, New York, Orange, and Cattaraugus, in the State of New York and at Chester, Pennsylvania, and Clinton and Haverhill, Massachusetts, and at other places within the United States unknown to the Grand Jurors. The time of the conspiracy charged is from on or about March 1st, 1933, up to and including October 4th, 1938.

A reading of the indictment and a thorough study of the indictment leaves these defendants without any knowledge of the precise offense with which they are charged and does
48 not inform them of the charge and the nature of the offense sufficiently to enable them to defend themselves or to prepare for trial. These defendants do not contend that it is essential to the validity of the indictment that some overt act on the part be alleged, but they do submit that to enable them to defend themselves it is essential that they be informed more particularly than the broad allegation that they conspired with the other defendants, of the long period named in the indictment and in the wide expanse of territories named in the indictment.

Without the following particulars these defendants cannot prepare for trial.

1. Will the Government contend that these defendants actually entered into a conspiracy with all of the defendants named or any other persons named in the indictment and not indicted? If not, with which one or ones of these persons will it be contended the defendants actually conspired?

2. At what precise time will it be contended either or both of these defendants entered into the conspiracy charged? If the precise time cannot be named, then at what approximate time?

3. What act or acts will it be contended that either of these defendants did as part of the conspiracy or in furtherance of the conspiracy and when and where were the acts committed?

4. Will it be contended that these defendants personally committed any act or acts in pursuance of the conspiracy? If so, when and where were the acts committed? What were the acts?

No other or previous application for the relief herein prayed for has been made to any Court or Judge.

49 Wherefore, this deponent in behalf of the defendants asks for an order of this Court requiring the United States Attorney for the Northern District of New York to furnish to these defendants the particulars hereinabove set forth.

DANIEL H. PRIOR.

Subscribed and sworn to before me this 23rd day of February 1939.

EUGENE G. HESS,
Notary Public, Albany County, New York.

In United States District Court

[Title omitted.]

Order denying bill of particulars

March 27, 1939

The defendants, Salvatore Falcone and Joseph Falcone, having moved this Court for an order compelling the United States of America to furnish a Bill of Particulars, unto them, in connection with the above-described indictment and said motion
50 having duly come on to be heard before this Court on the 27th day of March 1939, at Utica, State and Northern District of New York.

Now, upon reading and filing the order to show cause dated February 23, 1939, and the petition containing the demands for a Bill of Particulars thereto annexed dated and verified the 13th day of February 1939, in support of said motion and the defendants, Salvatore Falcone and Joseph Falcone, having appeared by Daniel H. Prior, Esq., by Eugene G. Hess, of counsel, of Albany, New York, and having been heard in support of said motion, and the United States of America having appeared by Ralph L. Emmons, United States Attorney for the Northern District of New York, by David D. Joselit, Assistant United States Attorney, and having been heard in opposition thereto, it is

Ordered, adjudged, and decreed that the said order to show cause is dismissed and the petition containing a demand for Bill of Particulars in connection with the above indictment be and the same hereby is in all respects denied.

FREDERICK H. BRYANT,
U. S. D. J.

51 In United States District Court—Northern District of New York

UNITED STATES OF AMERICA

vs.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, JOHN MELITO, SALVATORE A. GRANIERO, LAWRENCE GRIMALDI, JOHN NOLE, NICHOLAS NOLE, FRANK SOLDANO, AND FRANK J. MILOZZO

Bill of exceptions

Be it remembered that the above-entitled criminal cause came on before this Court for trial of the issues and for the determination of the various questions presented to the Court, by Bill of Particulars and Motions, and the following proceedings were had, to wit:

Before: Hon. Frederick H. Bryant, J. and a Jury.

10th day of May 1939.

Case

APPEARANCES

Hon. Ralph L. Emmons, Esq., United States Attorney, for the United States of America.

By David D. Joselit, Esq., Assistant United States Attorney.

Daniel H. Prior, Esq., Attorneys for Defendants Salvatore Falcone and Joseph Falcone.

52 Roger O. Baldwin, Esq., and Jack J. Danella, Attorneys for Defendant Henry Alberico.

Irving K. Baxter, Attorney for Defendants John Melito, Salvatore A. Graniero, Lawrence Grimaldi, John Nole, Nicholas Nole, Frank Soldano, Frank J. Milozzo.

Jury was duly empaneled, accepted and sworn, with two alternates.

Mr. David D. Joselit, Assistant U. S. Attorney, opens on behalf of the Government.

Mr. Daniel H. Prior opens on behalf of Salvatore Falcone and Joseph Falcone.

The following stipulation was entered into Open Court between all the parties:

That any motion or objection made or exception taken during the Trial by any defendant shall inure to the benefit of every other defendant without repeating or making a separate motion or objection or taking a separate exception.

53 *Witnesses on behalf of the Government*

Still Number 1

James A. Donahue, Special Investigator for the A. T. U., testified that he and other A. T. U. Investigators raided premises No. 632 Rosemont Place, Utica, New York, on the 28th day of April 1934, and found a still in operation and arrested therein James Calabrese and Frank Soldano (Appellant). The men that were arrested stated that one Peter Pizzuto had hired them. Donahue found from the records of the County Clerk's Office that Salvatore A. Graniero owned the premises. Graniero had stated to him that he had leased the premises to one Peter Pizzuto at a monthly rental of Thirty-five Dollars ($35.00).

The witness, on redirect examination, was questioned as follows:

By Mr. JOSELIT:

Q. Mr. Donahue, Mr. Byrne questioned you with reference to the lease which was allegedly executed by Peter Pizzuto. Did Mr. Graniero at the time of this conversation display to you any written lease?—A. I don't remember. To the best of my recollection I didn't think I saw the lease, although he might have had one.

Q. But you didn't see it?—A. I didn't see it.

Q. And did he tell you who Peter Pizzuto was?—A. Nothing more than to say that Peter Pizzuto was tenant at the Rosemont Place premises and that it was Pizzuto to whom he rented those premises for thirty-five dollars a month.

Q. And that conversation occurred at the other premises on Van Vorst Street, in Utica?—A. That is right

54 Mr. JOSELIT. That is all.

Mr. BYRNE. That is all.

Mr. BROAD. Well, I understand from Your Honor's ruling that certain conversation alleged to have occurred between this witness and the two defendants here is still in evidence? I now move to strike out that conversation in behalf of my client Joseph Calabrese on the ground that it has no bearing on this case. It does not in any tend to prove conspiracy in this case; no proper foundation laid for it.

The COURT. I will deny it as against your Defendant, and I will reserve the right to the others to move to limit it at a later date.

Mr. BROAD. I also ask Your Honor that the conversation go out unless there is further testimony in some way tying it into the present case.

The COURT. If there is no connection, I will entertain a motion to strike out at a future time.

Mr. JOSELIT. I will call Mr. Riley, Charles Riley. I may say to Your Honor we are taking these witnesses out of order.

The COURT. That is all right.

Salvatore A. Graniero also told investigators that after he had leased the premises he moved to Van Vorst Street premises, and that he paid a monthly rental of Forty Dollars ($40.00).

Eiddon I. Jones, Real Estate Manager of the First Citizens Trust Company of Utica, testified that Salvatore A. Graniero was a tenant of the bank on Van Vorst Street,
55 from April 1, 1934, to September 30, 1934, at the monthly rental of Forty Dollars ($40.00).

J. Brayton Fuller testified he was the County Clerk of Oneida County and that he had brought with him a book of deeds showing that 632 Rosemont Place, Utica, N. Y., was owned jointly by Salvatore A. Graniero and his wife.

Still Number 2

James A. Donahue, an A. T. U. Investigator, testified that, accompanied by other Investigators, with a search warrant he seized a still in operation on October 24, 1934, at 726 Catherine Street, Utica, New York. There was no one on the premises and no arrests were made at the time of the seizure.

Four days prior to the seizure, he noticed a truck loaded with drums coming into Utica. He followed it and lost it in the traffic. Some time later, and before the seizure, he again followed the same truck, and the truck drove into a driveway adjacent to 726 Catherine Street, Utica, N. Y.

Donahue testified that in October 1934 he saw John Melito driving his car on Mohawk, Bleecker, and Catharine Streets, Utica, New York. On January 10, 1935, he saw John Melito in U. S. Commissioner Arthur's Office in Rome, New York, and talked with him. Melito stated to him that he had driven one Rocco Caruso to the U. S. Commissioner's Office. Caruso was accused before the Commissioner of operating a still on Jay Street in the City of Utica, New York.

Mr. PRIOR. I object to the exhibits introduced in evidence of the still premises and to the entire testimony given, that it was
56 incompetent, irrelevant, immaterial, and improper and move that all the evidence be stricken out as to this raid at 726 Catharine Street from the record on the ground that it in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. PRIOR. Exception.

Eiddon I. Jones, Real Estate Manager of the First Citizens' Bank & Trust Company of Utica, N. Y., testified that premises 726 Catherine Street, Utica, N. Y., in 1934 was owned by the bank and that he leased the premises to a "Paul Kiscel" on May 1st, 1934, and has not seen him since. He further testified that Paul Kiscel was a tall, good looking man, and that the First Citizens Trust Company did not receive rent for the month of November 1934.

The witness was asked to look around the Courtroom to see if he saw "Paul Kiscel" and after looking he replied that Paul Kiscel was not in the Courtroom.

Ralph J. Cavallo, a plumber, residing in the City of Utica, testified that he performed plumbing work on premises 726 Catherine Street, Utica, N. Y., in 1934. He connected the water line from the main line to the cellar street wall and there stopped. He testified that he signed for water service for Paul Kiscel and was paid for material and four hours plumbing labor the sum of Fifty-five Dollars ($55.00).

Cavallo was asked by the Assistant U. S. District Attorney to go around the Courtroom to see if he could find Paul Kiscel. After looking, he stated that Paul Kiscel was not in the Courtroom. The witness also testified that he knew Paul Kiscel for one day

57 Victor Armitage testified that he accompanied Donahue and other officers to 726 Catherine Street, Utica, N. Y., and his testimony as to the finding of a still was similar to other officers.

John E. Evans, Service Clerk of the Utica Consolidated Water Company, now known as the Utica Water Bureau, testified to the following Government exhibits, which were introduced into evidence:

Exhibit 41—Water Service for 1934 Beech Grove Place, Utica, N. Y., from March 1934, to December 1934, by Salvatore A. Graniero.

Exhibit 42—Water Service for premises 726 Catherine Street, Utica, New York, the name of Paul Kiscel on September 20, 1934, by R. J. Cavallo.

Exhibit 43—Water Service for premises 510 Milgate Street, July 6, 1933, Ludwig Osikor.

Exhibit 44—Water Service for 3 Lamott Place, Yorkville, New York, by Joe Suba on October 24, 1935.

Exhibit 45—Water Service for premises 101 Clinton Street, Whitesboro, New York, by John Koval, on November 1, 1936.

Exhibit 46—Water Service for premises 1505 Girard Avenue, Utica, New York, by Nuncia Scalise in February 1937.

Exhibit 47—Water Service for premises 1934 Beech Grove Place, Utica, New York, by Joseph Santos, on March 7, 1937.

Exhibit 48—Water Service for premises 310 Pitcher Street by Vincent D'Amico on October 26, 1936.

58 Exhibit 49—Water Service for premises 819 Pierrepont Street, Utica, N. Y., by Levesky on November 1936.

Exhibit 50—Water Service for premises 726 Catherine Street, Utica, New York, by Michael Kane, on September 8, 1937.

Exhibit 51—Water Service for premises 910 Morris Street, Utica, New York, by Joseph Enearl, on October 29, 1937.

Exhibit 52—Water Service for premises 1166 Webster Avenue, by Frank Summa, on February 3, 1938.

Exhibit 56—Water Service for 3 Saquoit Street, Utica, New York, by Theresa Gravina, on March 10, 1938.

William Roberts testified that he is employed by the Utica Gas & Electric Company as a Utility Clerk and has been so employed since March 1930. He testified to the following Government exhibits:

Exhibit 58—Service for premises 632 Rosemont Place, Utica, New York, from March 13, 1934, to June 8, 1934. Deposit was made by Peter Pizzuto of $10.00 on March 14, 1934.

Exhibit 59—Service for 3 Lamott Place, Yorkville, New York by Joseph Suba from October 24, 1934, to November 7, 1937.

Exhibit 61—Service for premises 1605 Girard Avenue, Utica, New York, from February 27, 1937, to April 20, 1937, and one Anthony Laratro phoned in the application.

59 Exhibit 62—Service for 1166 Webster Avenue, Utica, New York, by Frank Suma from December 31, 1937, to Feb. 7, 1938.

Exhibit 63—Service for premises 726 Catherine Street, and there was commercial service from January 13, 1937, to March 25, 1937, by Michael Kane, and similar service from September 8, 1937, to Oct. 4, 1937.

Exhibit 63A—Service for premises 726 Catherine St., Utica, New York (commercial service) from September 19, 1934, to October 30, 1934, by Paul Kiscel.

Exhibit 66—Service for premises 3 Saquoit Street, Whitesboro, New York, March 14, 1938, to August 2, 1938, name of Ethel T. Gravina.

Exhibit 70—Service for premises 310 Pitcher Street, Utica, N. Y., from October 26, 1936, to April 19, 1937, by S. Iana.

Still Number 3

Victor Armitage, an A. T. U. Investigator, testified that on November 16, 1935, with other A. T. U. Investigators, by virtue of a search warrant raided premises 3 Lamott Place, Yorkville, New York, and seized a still, and arrested therein Joseph Canizarro,

Simon Drost, and Vito Anello. He found inside the premises twenty-two (22) bags of sugar, Hershey Brand. The still was set up ready for operation but no alcohol was flowing. Several minutes after the raid, George Bonanza drove in. He also was arrested.

The witness testified that in the premises he saw a steel still about 1,057 gallons in capacity; two four hundred (400)
60 gallon galvanized iron tanks; one 225 gallon tank; a copper column about 15 feet high and about 23 inches in diameter attached to the still or the cooker; three wooden mash vats; 1,606 gallons capacity, each full of mash; one wooden vat empty of the same dimensions, the same capacity; 22 100-lb. bags of Hershey's pure cane granulated sugar; and a carton labeled "National N. Q. Brand Yeast" which had been broken, and a couple of pounds removed leaving about 43 pounds.

Simon Drost testified that he was working in the still premises for four days and received no pay, that he had been hired by a man unknown to him. The witness identified George Bonanza as the person who gave him a lift to Federal Court in Albany. He also testified that he signed the name of "Joe Suba" to an application for water services for the premises. He testified that he signed the application at the request of a third person, whom he could not identify.

Vito Anello testified that he was picked up and taken in an automobile by a person unknown to him except by the name of "Joe," on the corner of Mohawk and Bleecker Streets, in the City of Utica, and taken to the still premises to clean them up. Joe Canizarro and Simon Drost came later to the still premises. There was a lot of sugar in the kitchen. After his arrest he was released on bail by the United States Commissioner. He did know the bondsman. Attorney Paul Matt, of Utica, represented him. He did not hire or pay the attorney and does not know who did. He does not know Joseph Canizarro.

Joseph Canizarro testified that he was caught by Federal
61 officers in the still premises at 3 Lamott Place. That was the first and only day that he had been at the still premises. He does not know any of the persons who hired him.

Still Number 4

Fred Apelian, a defendant named in the indictment but who had previously pleaded guilty to the indictment, testified that he was caught operating a still at premises No. 510 Milgate St., Utica, N. Y. Peter Lima, now deceased, had brought him there to work. Another man by the name of "John" worked there, but the witness

could not identify any person as "John." The witness did not know Ludwig Osika, the owner of the title to the still premises.

An objection was made by the defendants to the evidence regarding this still on the ground that it was immaterial and not connected to any defendant on trial. The Court received it subject to connection. The defendants took an exception.

Ludwig Osika testified that he was the owner of the real property where the still was found. He had rented it by written lease to Frank Brady. He did not know "Brady" before the signing of the lease and never saw him after the signing of the lease. Adrian Malsam, Attorney at Law, having offices in the Village of Yorkville, N. Y., drew the lease.

Still Number 5

Richard Lefors, an A. T. U. Investigator, testified that with Investigators Carroll, DeWeese, and Letteer, and under a search warrant, he raided premises known as the Baldwin Milk Station, near Sherburne, New York, on March 10, 1937, at 1:00 A. M. He
62 saw Nicholas Blase drive in a Ford V-8 truck bearing N. Y. S. license plates 224–988, to the still premises. He saw Blase unload drums and sugar bags. Other persons were helping. A few hundred feet away from the still premises was a farm house and in there were arrested Dominick Pangello and Anthony Zappia. In the still premises the witness arrested Eugene DiFondi and Enrico Ferro. He testified that a large still was in operation. He also found in the premises 2,800 lbs. of "Sucrest" sugar. There were also two receiving tanks with the name "Doyle Hardware Company, Utica, N. Y." on each.

John Newman testified that his daughter, Marian Rowland, was the owner of the Baldwin Milk Station. That one "Frank Wheeler," unknown to him, asked him if he would sell the premises. The witness had his attorney, Stanley Bliss, draw the necessary papers to transfer the title. His daughter signed her name to a deed at his request. A purchase money mortgage was taken back in her name in the sum of $1,200.00. The witness could not identify anyone in the Courtroom as "Frank Wheeler." The witness rented the farm house near the milk station to this same person.

George B. Sleeper testified that he was Village Clerk of Sherburne, New York, and was in charge of the furnishing of electric service for the village. A person giving the name of "Frank Wheeler" made application for electric service and paid a deposit to him. Herbert Butts was present at the time of the transaction.

Both Sleeper and Butts were asked to look at the persons in the Courtroom and identify any person as "Wheeler." They could not identify any person as Wheeler.

63 Anthony Zappia testified that he was a resident of Utica, New York; that he was arrested on March 10, 1937 in the farmhouse near the Sherburne still premises. A man known to him as "Freddy" or "Frank" hired him the day before the still premises were raided to go there to do some cement and sand work, and to do a job in some barn. He went to the premises the night before the raid and was arrested the next day. At his arraignment, bail was furnished and he was released on bail by the U. S. Commissioner. The bail was furnished by Mr. and Mrs. Graniero, the parents of Salvatore A. Graniero.

Anthony Zappia was asked by the U. S. District Attorney to look around the Courtroom to see if he could identify the person know as "Freddy" or "Frank." After looking around the Courtroom, the witness replied that "Frank" or "Freddy" was not present.

Still Number 6

Howard Edwards, an A. T. U. Investigator, testified that, accompanied by two other A. T. U. Investigators, Richard Lefors and Harvey DeWeese, with a search warrant, he raided premises No. 1605 Girard Avenue, Utica, New York, at about 6:30 A. M. on April 14, 1937. There a still was seized. The officers arrested therein Sam Barrone, Philip Lamonica, alias Joe Garruba, and Frank Morino. In the still premises the officers found one "International Economy Steam Boiler" with the stock number "6–S–28."

Sam Barrone, Philip Lamonica, and Frank Morino each testified that the person who had brought them to the still premises to work was Lawrence Grimaldi (appellant).

64 Richard Lefors, an A. T. U. Investigator, testified that while he was upstairs with the prisoners after the raid, he saw a tan colored car, Packard coupe, stop in front of the house. He recognized the driver of the car as Lawrence Grimaldi. Frank Morino got out of the car and went to the still premises.

Anthony Faga testified that he was Italian City Court Interpreter for the City Court of Utica, New York. He is not an Attorney at Law. Since 1920 he has filled in blanks of leases and other papers. He testified that he knew practically everybody in the Italian section of Utica. On February 15, 1937, although he had never seen Antonio Laratro before or afterwards he drew a lease for the premises 1605 Girard Avenue. He filled in a blank lease and for this was paid a few dollars. He was not present at the execution of the lease.

Irving L. Jones testified that he was the President of the International Heater Corp. of Utica, N. Y.; that he received an order from the Smythe-Despard Co. of Utica, N. Y., for a boiler, make No. and Style "6–S–28." Only one such boiler of that style number was made and sold by his company during 1937.

Thomas Pope testified that he is the secretary of the Smythe-Despard Co., Inc., and from the records of his company he testified that a boiler, Stock No. "6–S–28" was purchased from the International Heater Company in January 1937 and was sold by his company to Lawrence Grimaldi (appellant) for the sum of $238.00 cash.

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Still Number 7

Richard Lefors, an A. T. U. Investigator, and Rome O. Chandler, an A. T. U. Investigator, testified that with a search warrant, and accompanied by other officers, they raided premises No. 1934 Beech Grove Place, Utica, N. Y., on April 10, 1937, and upon entering the premises they found a 500-gallon still in full operation. They arrested at the still premises Paul Mira and Lorenzo DiCellio.

Chandler testified that he found in the premises six bags of Starlight brand sugar, 14 bags of Pearl White brand sugar, each of 100 lbs. He also found 145 five-gallon tin cans. Chandler testified that Mira told him he was working for a man named "Frank Wheeler."

Joseph Santos testified that he was the owner of the real property, 1934 Beech Grove Place, Utica, N. Y. That he had leased it to a man and woman by the name of "Rogers" in the month of February 1937.

The witness was requested by the U. S. District Attorney to go around the Courtroom and see if he could find the man or woman by the name of "Rogers," to which he later replied that he was not able to identify them.

Still Number 8

Howard Edwards, an A. T. U. Investigator, testified that he, with Investigators Rome O. Chandler, Thomas H. Wilcox and other officers with a search warrant, raided premises 310 Pitcher St., Utica, New York, on April 14, 1937, at 6:45 A. M., and that they found two 950-gallon stills. There was no one in the premises and no arrests were made. Fifteen minutes pre-
66 viously he had raided a still at 1605 Girard Avenue, Utica, N. Y., and the distance from Girard Avenue to Pitcher Street is approximately fifteen blocks. There were 59 bags of

sugar, each of 100 lbs., marked "Matzas Estates, Cuba." Each bag was marked "A–9." He also found 28 five-gallon tin cans.

The following objection was taken by the defendants:

Mr. BYRNE. I think if the Court please I will object to those exhibits as incompetent, irrelevant, immaterial, and improper, and also move that all of the evidence of this witness as to this raid on Pitcher Street be stricken from the record on the ground that it is in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. BYRNE. May I have an exception. And in the event that it isn't later connected may I have the right to renew the motion?

The COURT. Yes; I will entertain the motion.

Vincenzo D'Amico testified that he was the owner of the real property, 310 Pitcher Street, Utica, N. Y. He had leased the premises by written lease to a man known to him as "Salvatore Eonia." He was requested to go around the courtroom to see if he could identify this man and he was not able to do so. Anthony Faga had drawn the lease. The witness signed an application for water service at the premises. Under the lease, "Salvatore Eonia" was responsible for paying the water charges.

Anthony Faga testified that in the pastry shop of Vincenzo D'Amico he saw both Vincenzo D'Amico and a person whom he later knew as "Salvatore Eonia" talking, and upon the request of Vincenzo D'Amico he drew a lease for premises 310
67 Pitcher Street, Utica, N. Y., and was paid a couple of dollars. This witness testified he had never seen "Eonia" before or since.

Still Number 9

Howard Edwards, an A. T. U. Investigator, testified that, accompanied by Investigators Chandler, Wilcox, Clay, and Honkala, and with a search warrant, he raided premises No. 726 Catherine Street, Utica, New York, on September 30, 1937. A large still was in operation but no one was present at the premises. He testified that he found 21,000 gallons of mash; about three dozen empty five-gallon tin cans; 55 cardboard cartons, each sufficient to contain one dozen five-gallon cans; two pounds of permanganate of potash; over 200 empty sugar bags. On one of the cartons was stenciled the following: "Alberico & Funicello, Utica, New York, from the Atlas Can Company, Brooklyn." The sugar bags were all "Sucrest" sugar bags.

An objection was made by the defendants to the evidence regarding this still on the ground that it was immaterial and not connected to any defendant on trial. The Court received it subject to connection. The defendants took an exception.

Walter F. Martin, Special A. T. U. Investigator, testified that he found fifty "National Grain Yeast" wrappers on the premises, and close to 300 "Sucrest" sugar bags, some stenciled or stamped "13–1–7" and others stamped "½ 9–1–7." In addition a wooden box, and in the upper left-hand corner was stenciled the name "Atlas Can Company." Further down on the box was stenciled the name "Alberico & Funicello, Utica, New York." On the end of the box was marked with a crayon "Tops." He looked into the box and observed therein two or three dozen can screw caps.

68 Still Number 10

Rome O. Chandler, an A. T. U. Investigator, with other officers and with a search warrant raided premises No. 400 Railroad Street, Frankfort, N. Y., on November 5, 1937. He was making observations, using a pair of field glasses. He entered through an open door. Nick Fabrizio was pumping water from a pit in which was a boiler, about three feet below the surface of the floor.

In the building was an International Empress low-pressure steam boiler, about three feet of water in the pit. In the building were a number of bottoms of mash vats and a lot of staves from mash vats. There was on the floor a residue of yeast fermentation. On the second floor were a large number of five-gallon cans and about 100 carton containers; 3 or 4 of the containers bore the name of "E. Damsky & Son." At the northerly end of the barn was a corrugated tunnel running 40 or 50 feet into the field. On a drum of caustic soda was stenciled the name of "A. H. Williams, Hotel Street, Utica, New York." An empty "Sucrest" sugar bag was found. No still or other apparatus except those testified to by the witness was found.

An objection was made by the defendants to the evidence on the ground that it was immaterial and improper. The Court received it subject to connection. The defendants took an exception.

Cross-Examination

Mr. Chandler testified that the only things seized were an empty "Sucrest" sugar bag, and an empty drum, and that no arrests were made, on the 5th day of November 1937; that he saw Daniel Labella sawing a board and making repairs on
69 the second floor. That the only objects that were taken by himself or any other officers of the Government were one empty "Sucrest" sugar bag and a drum; that none of the other

articles which he saw at the premises were seized or taken away by any Government agent that he knew of and no arrests of any persons were made at the time when he visited the premises.

Frank Spata testified that he was the former owner of premises No. 400 Railroad Street, Utica, New York, and that he sold said premises to "Frank Terra" in the month of December, 1938. He was requested to go around the courtroom and see if he could see "Frank Terra." He testified that he was not able to see him.

Walter Martin, A. T. U. Investigator, testified that a few days prior to November 5, 1937, he had seen the defendants Joseph Bonanza and Daniel LaBella go to the premises at 400 Railroad Street, Frankfort, N. Y.

Still Number 11

Howard Edwards and Rome O. Chandler, A. T. U. Investigators, testified that, with a search warrant, and accompanied by other officers, they raided premises No. 1719 Pierrepont Avenue, Utica, New York, on April 28, 1937, at about 6:20 A. M. A still was set up and ready for operation but the vats were empty. There was no one inside the premises and no arrest was made.

They found a 1,000-gallon still; 90 empty five-gallon cans; 60 empty folding can cartons; 25 empty Starlight Brand sugar bags; 25 empty Hershey Brand sugar bags, marked "A–9"; a receiving tank, stamped "Doyle Hardward Company, Utica, New York."

70 The following objection was made on behalf of the defendants:

By Mr. JOSELIT:

Q. And have you with you the inventories which you personally made and kept on April 28, 1937?—A. I have.

Q. By reference to your inventories will you tell us, as quickly as you can, the contents of these premises?—A. One 1,000 gallon——

Mr. PRIOR (interruption). I object to this as irrelevant and immaterial. I am doing this because the Assistant U. S. Attorney has not connected them up and I think it is unfair to have this picture of a number of stills apparently in this district unless they can be connected with some defendant, and further, he hasn't said he is going to.

Mr. BYRNE. Same objection.

The COURT. Overrulued.

Mr. PRIOR. Exception.

Still Number 12

Rome O. Chandler, Thomas Wilcox, Walter F. Martin, and Howard Edwards, A. T. U. Investigators, and Patrick J. Corbett and Joseph Stealey, Members of N. Y. S. Police, testified that, with a search warrant, they raided a farm on August 24, 1937, known as the Jones Farm, in the Town of Remsen, near Russia, N. Y., and there found two large stills in operation. They arrested Frank Tretta, Joseph Sarcone, Frank Bumbolo, Joseph Zepetti, alias Joseph Salemo, Elmer Pflanz, and Natalo
71 Ormarso. All were on trial. They found receiving tanks with the name "Doyle Hardware Company, Utica, N. Y." and yeast wrappers with the name "Acme Yeast Company."

John T. Kinney testified that his wife Letta D. Kinney, as the owner of the premises known as the Jones Farm in the Town of Russia. One "Ralph Lasondo" came to his house to inquire about the sale of the premises. The witness had never seen "Lasondo" before. A sale of the property was effected.

The Assistant U. S. District Attorney asked the witness to go around the courtroom to see if he could identify any of the defendants as "Ralph Lasondo." He described "Lasondo" as a short man, medium build. After looking around the courtroom he answered that Ralph Lasondo was not among the defendants.

Wesley Kimball testified that he was an electrician, and sold and installed Delco lightplants. A person known to him as "Ralph Lasondo" ordered a Delco Lightplant installed on the Jones Farm in the Town of Russia. He installed the electric light system, and after having made the installation, he went to the Jones Farm on three different occasions. On the first and third occasions he met a different man at each time and on the second occasion it was dark and he saw no one.

Walter Martin, A. T. U. Investigator, testified that prior to the still seizure on Jones Farm he had observed Elmer Pflanz going to the vicinity of the still site on several occasions, together with Joseph Sarcone, and one other man. Both were defendants on trial.

72 Still Number 13

Rome A. Chandler and Walter F. Martin, A. T. U. Investigators, testified that they raided the premises known as the Kelly Farm, near the City of Rome, N. Y., on October 7, 1937, and there found a still in operation. They arrested Anthony Zappia, Arthur Casano, and Frank Cosimeno. They testified that Anthony Zappia called from the U. S. Commissioner's Office in Rome, N. Y., Utica, 2-9865, which was the telephone number of the Venezia Caffe, in the City of Utica. Anthony

Zappia, by telephone, asked to have Patsy Catalano come to bail him out. Chandler also testified that he found sugar in the barn; these witnesses testified that they found a Ford coach bearing license No. 8–P–8678 in the barn at the still premises.

Frank Cosimeno testified that he had leased the Kelly Farm from the Arcade Bank, Rochester, N. Y.; that he was on the premises when the raid took place and that he also was arrested; that he had sublet part of the premises to one "Peter Tocco"; that he, himself, had pleaded guilty to possession of an unlicensed still, and that he was not a defendant in this case, but he was named in the indictment as a co-conspirator.

He was requested by the Assistant U. S. District Attorney to see if he could identify "Peter Tocco" among the defendants. After looking, he replied Peter Tocco was not among them.

Walter F. Martin, A. T. U. Investigator, testified that exhibits 263 to 267 inclusive were empty sugar bags that he found on the premises.

Exhibit 263, American Sugar Refining Co. of N. Y.; No. 82357, Abstract No. 570.

73 Exhibit 264 Snow White Sugar Refining Company.

Exhibit 265 Sucrest sugar bag having the manufacturing date 14–J–7.

Exhibit 266 American Sugar Refining Company of N. Y.: 82407–Abstract 57.

Martin testified that on September 28, 1937, he saw car No. 8P–86 78 in front of 817 Ontario Street, Utica, the home of Sam Grio, a co-conspirator. He saw the same car two days later in front of the Venezia Cafe. He saw the same car on October 7th at the Kelly Farm.

Still Number 14

Rome O. Chandler, an A. T. U. Investigator, testified that, with other officers, on January 17, 1939, raided premises No. 910 Morris Street, Utica. New York, and there found a still in operation. They arrested Peter Sabino.

In the premises were one large steel still; four sections of copper column, and one dephlamater with a capacity of 860 gallons; three 430-gallons galvanized mash vats, filled with mash; two 170-gallons galvanized receiving tanks, one containing 100 gallons of alcohol and each bearing the name "Doyle Hardware Company, Utica, New York"; one 110-gallon cooling and condensing tank; one low-pressure International steam boiler; one 50-gallon drum full of molasses, the drum bearing the name "Thomas Gaines & Son, Sherburne, New York"; 15 full 100-lb. "Sucrest" sugar bags; 50 one-pound packages of yeast wrapped in plain wrappers; 35 pounds of yeast, one-pound packages bearing the label "National

Grain Yeast Company"; "Belleville, New Jersey"; one-half ton of coke; 250 feet of two-inch galvanized iron pipe; 35 feet of rubber hose; one 50-gallon drum caustic soda marked "A. H. Wil-
74 liams Company, Hotel Street, Utica, New York"; 53 empty "Sucrest" sugar bags, each bag was stenciled or stamped with a symbol representing the date it was packed at the refinery. The stamps on various bags were "13–A–8"; "13–A–8"; "10–A–8"; "12–A–8"; "19–K–7"; "18–K–7"; "10–I–7"; "½9–I–7"; "15–K–7"; "10–I–7."

The following objections was made on behalf of defendants:

"Mr. BAXTER. May it please the Court, I desire to object in behalf of my client to this offered evidence and to all of the evidence by this witness as to this subject matter on the further ground that there is no evidence tending to connect this defendant with the alleged fact. I desire particularly to call attention that in the event that there should be a failure of such connection, the affect of such evidence presented to the jury is prejudicial and cannot be eradicated. I think if this be answerable to all it would be only after they were shown to be charged after my client. And may I have that objection sustained to all of the testimony which has been given or which may be given on this subject by this witness?

The COURT. Yes; the objection is overruled.

Mr. BAXTER. May I have an exception?

Mr. PRIOR. I have no objection. Of course, I am assuming all of this is being taken subject to connection.

The COURT. Yes.

Thomas Bonacci testified that he was the owner of the premises No. 910 Morris Street, Utica, New York, and that he leased
75 the premises to one "Edoardo Mingo." He had never seen "Mingo" before the execution of the lease. Mingo brought to the witness a lease signed by him. Bonacci then signed the same.

Anthony Faga testified that "Edoardo Mingo" came to his home and requested that a lease be drawn for premises No. 910 Morris Street, and that Faga drew the lease and "Mingo" paid him. Faga could not identify Mingo as a person among the persons in the courtroom. He testified that the only occasion upon which he saw Mingo was when Mingo came to draw the lease. He testified he had never seen Mingo before or since.

Peter Sabino testified that he was arrested in the premises 910 Morris Street, and that he pleaded guilty to possession of an unregistered still. He worked in the still three days but did not know the name of the man who hired him. He had never seen the man before or since. When he was arrested his attorney was Salvadore J. Capecelatro and did not know the names of his bondsmen. He

received a Notice from the U. S. Attorney to appear at Federal Court in Albany. He brought the Notice to Mr. Capecelatro's Office.

Salvadore J. Capecelatro, an attorney, of Utica, testified that from the papers in his file, it appeared that Mariano Penge had requested his Office to represent Peter Sabino and had paid $250.00 for the services. He testified that Lawrence Grimaldi (appellant) on April 14, 1937, employed him to represent persons arrested at the still premises, 1605 Girard Avenue, Utica, N. Y.

76 Still Number 15

Alton Clay, Harvey DeWeese, Walter F. Martin, Rome O. Chandler, A. T. U. Investigators, and Charles Curtin, Sergeant, N. Y. State Police, testified that they raided the Bortiatynski Farm, near Lee Center, N. Y., on January 8, 1938, and found a full still in operation. They arrested Daniel Di Joseph. That they found in the premises a 2,000-gallon still; one 360-gallon galvanized iron mixing vat containing 180 gallons of water; one yeast keg bearing the name "New York K. M. Yeast"; 170 empty five gallon tin cans.

Frank Bortiatynski testified that he was the owner of the farm near Lee Center, Oneida County, on which the still was found. Salvatore A. Graniero came to his farm and bought eggs. He had seen Charles Skora, also on trial. Salvatore A. Graniero (appellant) returned a week after he had first seen him, with a lease. The witness signed it. A man called "Mosey," whom he did not know and could not identify, brought sugar and boxes and took away alcohol. This witness was arrested at the premises. He was arraigned in Federal Court at Albany, and represented by Paul Matt, an attorney practicing at Utica, New York. The witness neither hired nor paid the attorney. He was released on bail, but did not know the name of the surety.

Steve Bortiatynski testified that he is a son of Frank Bortiatynski, the preceding witness. He was arrested at the time of the raid upon the farm. Daniel DiJoseph (on trial) hired him to work in the premises at $4.00 per day, but he did not get paid.

77 Paul Matt testified that he is an Attorney at Law; that he had represented many defendants charged with violations of the Internal Revenue Laws. He appeared for persons arrested in connection with premises 3 Lamott Place in the year 1935. Leo Coupe, an Attorney, appeared with him in these cases; he appeared with these persons in Federal Court at Albany; that he was one of the attorneys for defendants arrested at the Bortiatynski Farm; that Salvatore A. Graniero (appellant) hired him.

Walter F. Martin, A. T. U. Investigator, testified that at the still premises he found 92 "Sucrest" sugar bags; each bag was stamped with the following inscriptions: "15–K–8"; "3–A–8"; "20–K–7"; "19–K–7"; "18–K–7"; and "17–K–7." In the premises were three receiving tanks marked "Doyle Hardware Company, Utica, New York." He also found "K. M. Hungarian" yeast, sold by Shortex Products Company, 123 Pierce Street, New York City.

Still Number 16

Rome O. Chandler, Alton Clay, Walter F. Martin, Harvey DeWeese, testified that, with other officers on January 31, 1938, they raided premises No. 1166 Webster Avenue, Utica, N. Y. in execution of a search warrant and arrested therein Lawrence Grimaldi (appellant), Rocco Falotico, Julia Falotico, and Patsy DeRosa, also on trial.

Defendants objected to the use of the evidence on the ground that the search warrant was illegal, invalid, and void, and asked the Court to direct the witness to produce what he was calling a search warrant. The Court then stated that he would not stop to have the search warrant produced at that time, but that
78 defendants could produce a certified copy and offer it in evidence if they questioned its validity. The defendants produced a certified copy which was testified by Harvey DeWeese, A. T. U. Investigator, as a copy of the search warrant that he had used, and it was offered and received in evidence. It appeared from the search warrant that the premises was a dwelling house and the premises to be searched was described by street and number only without giving city or state wherein it was located.

Investigator Chandler further testified that he found in the premises 1 steel pot, containing 1280 gallons of mash, 2 large vats, 6 steel vats, containing a total of 5120 gallons of mash, 75 gallons of alcohol, 1 low-pressure International Economy Boiler, and other miscellaneous iron pipes and fittings; a 1934 Coupe was seized in the driveway in the rear of the building, bearing license No. 2P–22 49, and that a Firestone Battery ticket No. 326 was found on the battery.

Pauline Aiello testified that she was the owner of the premises 1166 Webster Avenue, Utica, N. Y. She had let the property to "Frank Summa" by written lease. Anthony Faga had brought "Summa" to her.

Anthony Faga testified that "Frank Summa" came to him in the courtroom of the City Court of Utica and talked to him about leasing the property, 1166 Webster Avenue. He knew the owner of the property because his brother-in-law, Felix Leone,

formerly lived there. Faga prepared the lease. This witness testified he had never seen "Summa" before or since.

J. E. Spencer testified that he was District Manager for the Firestone Corporation at Syracuse, New York; that the ticket, a copy of which was in his file, was issued to "John Milato, 510 Elizabeth Street."

79 Investigator Walter F. Martin testified that in the still premises he found 30 empty "Sucrest" sugar bags, stamped with the date on which they were packed at the refinery. The various stamps "17–A–8," indicated the date on which they were packed at the refinery.

Still Number 17

Rome O. Chandler, Alton Clay, Harvey DeWeese, A. T. U. Investigators, testified that with other officers, they seized a still on August 6, 1938, at premises No. 203–205 South Charles Street, Rome, New York, and there arrested Fred Apelian.

DeWeese testified that at the still premises he saw one large still part and other equipment usually used in still operation. He found there five empty "Sucrest" sugar bags stamped "29–F–8."

Fred Apelian testified that he was arrested at the still premises; that he had been working there one day but did not know the man who had brought him there to work.

Still Number 18

Alton Clay, an A. T. U. Investigator, Frank W. Tobin, Chief of Police of Whitesboro, and Lawrence Fox, Sergeant, N. Y. S. Police, testified that on July 21, 1938, they made a seizure at 3 Sauquoit Street, Whitesboro, New York, and there arrested Nicholas Blase. At the premises they found one 1,200-gallon still with mash and equipment. There were found also 140 "Sucrest" sugar bags; 50 were stamped "29–F–8"; 36 were stamped "26–F–8"; 14 were stamped "6–F–8"; the remaining 40 bags had no

80 identification other than that of the printer and manufacturer.

Clay testified that he found at the premises a card on which were written in pencil the numerals "29865."

Mrs. Schmidt, the owner of 3 Sequoit Place, Whitesboro, testified she rented the premises to John Smith. She identifies defendant Salvatore A. Graniero as John Smith.

The following objection was taken in behalf of the defendants:

Mr. [illegible]. If the Court please, I am understanding this evidence goes in subject to being connected with the conspiracy charges in the indictment?

The Court. Yes.

Still Number 19

Rome O. Chandler, Howard Edwards, Alton Clay, Harvey DeWeese, A. T. U. Investigators, testified that, with other officers, including N. Y. S. Police, and with a search warrant on October 4, 1938, they raided premises on Frances Street, in the Town of New Hartford, New York. They arrested there the defendants Frank Milozzo and Charles Skora. They found in the premises a still, mash, receiving tanks, one Gould electric pump and motor with base number "141–498," one low-pressure steam boiler of eight sections manufactured by the Utica Radiator Corporation of the red square type No. 25. It was a new boiler. They found in the premises 23 bags of H. & E. cane sugar, each containing 100 lbs. manufactured by the American Refining Company, and three empty "Sucrest" sugar bags stamped "13–F–8."

Biaggio Collella, the owner, testified that he entered into a lease with one "Anthony Donato," whom he had never seen before. "Donato" brought a prepared lease, signed it, and paid him $50.00 for two months rent in advance.

81 I. Wolfe Gilbert testified that he was Manager of the Utica Radiator Corporation of the City of Utica, N. Y.; that Rocco P. Zito, a plumber, with two other men on September 13, 1938, had inquired about a red square boiler. He did not know Salvatore A. Graniero. Such a boiler was sold to Rocco P. Zito and the two other men on September 13, 1938. Later in the day, the same witness testified that Salvatore A. Graniero (appellant) was one of the men who had called with Rocco P. Zito to discuss the purchase of the boiler and that Graniero had paid him the purchase price of the boiler. He identified Graneiro in the courtroom.

Salvatore J. Capecelatro, attorney, testified that Salvatore A. Graniero retained him to represent the defendants arrested in connection with the still seized at Frances Road, New Hartford, New York.

Still Number 20–21

Walter F. Martin, Special A. T. U. Investigator, testified that on or about March 17th or 18th, 1938 he secured permission from the First Citizens Bank and Trust Company, Utica, New York, to enter into premises 58–60 N. Genesee Street, Utica, New York, and he made certain observations and pictures of the interior of the building. The premises were empty. He observed stains on the floor. There was a hole about 27 x 28 inches in diameter leading up to the floor above. The windows were painted white. A few plain yeast wrappers were on the floor and broken thermometer with a string attached thereto was near by.

He further testified that, accompanied with other A. T. U. Investigators, with a search warrant, raided premises known as 29 Whitesboro Street, Utica, New York, on March
82 16, 1938. That he found in a desk on the first floor a sheet of paper upon which appears the numbers, "2-9865", and a name "Harry Bohn, N. Y. C." That he discovered in the hand of Frank Milozzo (appellant) a key which the witness testified fitted a lock on the door leading from the first floor of the said premises to the second floor; that on the third floor of the said premises a wooden yeast keg was found, stenciled "K-M-Yeast"; that on a loading platform attached to the building there was found a five-gallon tin can.

Richard Lefors, an A. T. U. Investigator, testified that he was observing premises No. 29 Whitesboro St., Utica, N. Y., during the month of March 1938; that he was in Room 233 of the Milner Hotel on the opposite side of the street and that he had a full view of the premises 29 Whitesboro Street; that over a period of four days, he observed George Blake in and about the premises on numerous ocasions; that on March 16, 1938, in company with Investigaters DeWeese and Rome O. Chandler, Walter F. Martin and other A. T. U. Investigators, they raided premises 29 Whitesboro St. with a search warrant; Vincent Marrone, Frank Milozzo, and Victor Sannee were arrested in the premises. That he found in the premises, on the second floor, a distillery set up for operation, together with a number of cardboard cartons containing new five-gallon tin cans.

Harvey DeWeese, An A. T. U. Investigator, testified that he, accompanied with other A. T. U. Investigators, with a search warrant, raided premises No. 29 Whitesboro Street, Utica, N. Y., on March 16, 1938. He observed in the premises a large steel still, 125 gallons of distilled spirits, 3 wooden mash vats
83 containing about 4,880 gallons of fermenting mash, two drums of 54 gallons each full of molasses, 400 pounds of urea, 50 pounds of caustic soda, 25 pounds of yeast, one electric pump, and other miscellaneous pipe fittings.

George Blake testified that he is thirty-three years of age, born in Burlington, Vermont, and that his occupation is a Freight Terminal manager. That he came from Vermont to the City of Syracuse about twenty years ago and after leaving Syracuse went to the City of Utica and engaged in the freight and trucking business, for the Central New York Freightways during the years 1935, 1936, and 1937. While he was so engaged he had complete charge of the freight terminal located at 25 Whitesboro Street, Utica, New York. That he first met Salvatore Morreale in the latter part of 1936 while Blake was in charge of the Central New York Freightways. About the middle of December 1937,

at 58–60 North Genesee Street in the City of Utica he again met Salvatore Morreale and was introduced by Morreale to Emmet Marrone (on trial) then known to the witness as "Al Morgan." The witness asked Morreale if the latter had any jobs open. Morreale replied that he had just started business. He offered the witness a job soliciting freight on a commission basis. The witness told Morreale he could not do this because business was slow. Morreale then offered to take the witness into his business and split the profits with him. Morreale suggested to him that the Kulp sign be removed. This was done and a new sign "Blake Transportation Company" was placed on the building. Prior to the changing of the sign Morreale told the witness that he, Morreale, had been in trouble with the federal officers and thus did not want his (Morreale's) name to appear on the sign.

84 Morreale told him that he was operating a still on the second and third floors of 58–60 North Genesee Street; that he had been tipped off that the still was to be raided and that he was looking for another place. He said he had found a new place at 29 Whitesboro Street.

Morreale gave the witness fifty dollars to deposit with the Telephone Company for the installation of a telephone at 29 Whitesboro St. The witness was introduced to Joseph Battaglia, then called "Joe Bruno," and Morreale told the witness that he rented the lower part of the premises from Joe Bruno. In the first part of January, Paul Mira, Dominick Morreale, known as "Meanie" (both on trial), and a man known to him as "Soldier" came. Blake identified the "Soldier" as being Frank Soldano (appellant) and testified that Soldano operated the boiler for the still at 58–60 North Genesee Street. About the middle of January 1938, Salvatore Morreale received a telephone call in the evening. He hurried away from the building and another man known to the witness as Frank J. Milozzo ran out of the building. The next morning Morreale told the witness that he had been tipped off the night before by a telephone that the still was going to be raided. The next evening the still was dismanteled and was moved out of the building. After the still was out the premises Blake and Emmett Marrone cleaned out the upper floors of the building. Joseph Battaglia came in and Morreale told Battaglia to give Blake $3.00 for cleaning up, which Battaglia did.

Around the first past of February 1938, Salvatore Morreale visited the witness at 58–60 North Genesee Street, Utica. He told the witness that he was looking for a still location and had located one at #29 Whitesboro Street, Utica. He suggested that if the witness would lease the building, he could use the first floor for trucking purpose.

85 At Morreale's request Blake rented from the First Citizens Bank and Trust Company of Utica the entire building, 29 Whitesboro Street at a monthly rental of $75.00. Morreale paid the rent. Rocco Zito, a plumber, did some plumbing work upon the boiler and piping on the second and third floors of the building. Emmett Marrone assisted Rocco Zito. The trucking business was continued by Blake and Morreale on the first floor of the building. Blake took care of this business. The still was moved from 58–60 North Genesee Street to 29 Whitesboro Street.

Dominick Morreale, Paul Mira, Salvatore Morreale, and Emmett Marrone helped Zito run the pipes and erect the still and the vats on the third floor. This was done on the 7th day of February 1938. The witness was given $10.00 by Salvatore Morreale for a deposit on the electric lights and the witness further had the telephone changed from 58–60 North Genesee Street to 29 Whitesboro Street. During the last week of February 1938, Salvatore Morreale asked Blake if he wanted to make $20.00 a week and for this money he was to deliver the alcohol from the still, to pick up sugar and empty cans. During the day Frank Milozzo (appellant) and Emmett Marrone were taking care of the still and at night Frank Soldano (appellant) and another man whom Blake did not know were operating the still.

Salvatore Morreale was the owner of a Chevrolet pick-up truck and the witness drove this Chevrolet truck while he delivered the alcohol and picked up the cans and sugar. The alcohol was taken from the still premises to the home and grocery story of Salvatore Morreale's mother at 315 Mohawk Street, Utica. When the alcohol was delivered, Dominick Morreale followed the truck
86 in another car. The alcohol was loaded on to the truck by Emmett Marrone. After the first load of alcohol was delivered, Salvatore Morreale stated that he had to go see the boss for money for sugar and cans and the witness waited at Morreale's mother's home and upon Morreale's return followed Morreale's car to the wholesale grocery house of Alberico and Funicello. The witness waited outside of the wholesale grocery while Dominick Morreale entered and then drove the truck into a garage, two driveways from the grocery store where some employee of the grocery store came out, opened the door of the garage, and loaded four cartons of empty five-gallon cans of twelve cans to the carton and twenty bags of sugar on to the Chevrolet truck. The witness took the sugar and cans to the still premises at 29 Whitesboro Street. That during the time the still was operating, Blake went to the grocery store operated by Salvatore Morreale's mother about twelve or fourteen times for the purpose of delivering alcohol. Some of the time the witness went with Salvatore Morreale

to #718 Lansing Street to look for the "boss" to get the money to get sugar. Some of the time they went to the Venezia Cafe.

About the first of March 1938, Salvatore Morreale told Blake that they would go looking for the boss to get money to buy the sugar. They went to 718 Lansing street and from there to the Venezia Cafe. They did not find the boss at Lansing Street and the Venezia Cafe but as they were driving down Bleecker Street, a main thoroughfare of the city of Utica, and as a Ford Coupe was coming in the opposite direction, Salvatore Morreale said, "There's the boss now." Blake and Morreale stopped their car. The Ford car stopped and Morreale got out, walked over to the Ford Coupe across the street. The license number of the
87 Ford was 2P–736 and the driver of the Ford car was John Melito. After Morreale returned to the car he drove Blake back to Morreale's Mother's grocery store where Blake picked up the Chevrolet truck and went to the wholesale grocery store of Alberico and Funicello where he got sugar and cans. On one occasion during March 1938, Blake heard a conversation between Salvatore Morreale and Henry Alberico (appellant) which took place at the garage of Alberico and Funicello where the sugar was.

Question. "Who was there?

Answer. "Mr. Alberico and this employee and myself and Salvatore Morreale."

The Court. "When was that?"

The Witness. "In March, sir, the first part of March."

Mr. Joselit. "State what occurred and what you heard on that occasion."

Mr. Prior. I object to it as irrelevant, incompetent, immaterial, hearsay, not calling for any statement made in the progress or in aid of any conspiracy alleged in the indictment, or otherwise.

The Court. "Overruled."

Mr. Prior. "Exception."

The Witness. "Salvatore Morreale says to Mr. Alberico, 'You could have trusted me for sugar, this morning.' Mr. Alberico says, 'I can't trust you because your business is too risky.'"

Mr. Prior. "I move to strike that out on the same grounds."

The Court. "Motion denied."

Mr. Prior. "Exception."

88 After the above conversation Blake testified he took a load of sugar and cans from the garage of Alberico and Funicello. The brand of the sugar was "Sucrest." He transported the cans and sugar to the still at No. 29 Whitesboro Street.

By Mr. JOSELIT:

Q. State what next occurred?—A. Well I said we went to Alberico's and picked up the sugar and two cartons of cans and went back to 29 Whitesboro Street.

Q. Who waited upon you at Alberico's?—A. This same fellow who waited on us before.

Q. Who else was with you?—A. Salvatore Morreale.

Q. How many occasions did you go to the wholesale grocery store and location on Bleecker and Hotel Street and load up sugar and cans?

Mr. PRIOR. This has been gone over twelve or fourteen times.

The COURT. No, that was the delivery of alcohol.

Mr. PRIOR. All right. He said he carried out the same process each time.

The WITNESS. Between eight and ten times.

By Mr. JOSELIT:

Q. Was there an occasion when you saw the defendant, Henry Alberico?—A. I did, sir.

Q. Do you know the defendant Henry Alberico?—A. I do, sir.

Q. Can you point him out, sir?—A. I can if he is here.

89 (The Defendant Henry Alberico stood up in the Court-room.)

Mr. JOSELIT. May the record show that the witness has indicated the defendant Henry Alberico.

On an occasion during February or March 1938, the witness had a conversation with Salvatore Morreale in the rear of the premises at 718 Lansing Street, Utica, Morreale and the witness had delivered 20 cans of alcohol to 315 Mohawk Street, Utica, and on that afternoon Morreale called the witness and said "The boss is raising the devil, one can of alcohol is missing." Morreale told Blake, the next morning, "You follow me, we are taking the alcohol up to the bosses house." Blake followed Morreale to 718 Lansing Street. In the driveway was a Ford Coupe license number 2P-736, the same car that Blake had seen on Bleecker Street with John Melito driving it. Blake backed the Ford car to the street then backed the Chevrolet truck containing the alcohol into the garage. Prior to his backing the truck into the garage, Salvatore Morreale went into the premises 718 Lansing Street and returned with the keys to the garage and opened the garage doors. Blake delivered alcohol to the premises at 718 Lansing Street on three different occasions. On the last occasion Salvatore Morreale went into the house and came out and stated to Blake, "They are not up yet." While Morreale and Blake were standing in the back yard, John Melito came to

the back balcony of 718 Lansing Street took the keys down to Morreale and said, "Here's the keys." Melito on this occasion was dressed in a bath robe.

On one occasion, on a Sunday morning, the witness went to the corner of Jay and Kossuth Street, Utica, New York
90 with Salvatore Morreale. He saw standing outside the building located on the corner a person known to him as John Nole (appellant) and saw Salvatore Morreale talk with John Nole. On three occasions Blake with Salvatore Morreale went to these premises and secured yeast. The yeast was in plain cartons and some in kegs and on one occasion John Nole (appellant) told the person in the store to let us have the yeast, and the yeast was taken to the still at 29 Whitesboro Street. The witness never used any other automobile or truck for the purpose of hauling alcohol, cans, sugar, or men except the Chevrolet truck owned by Salvatore Morreale. On two occasions he used his own tractor trailer truck in taking workmen to the still. On the 16th day of March 1938 late in the afternoon as the witness was bringing the night shift to 29 Whitesboro Street as he drove up to the building federal agents ran out of the building and one of the fellows with the witness said, "There's a knock-off. Go on and get away." The witness turned the truck around and drove away without being apprehended. After two weeks of hiding he surrendered and has since pleaded guilty to the possession of the still at 29 Whitesboro Street and also to this indictment for conspiracy.

Cross examination by Mr. BALDWIN:

"Did you plead guilty in this Court to a crime.
Answer. I did."

91 Evidence Relating to all of the Foregoing Stills

Charles Riley, Assistant U. S. Chemist, testified that he examined and analyzed samples of liquids seized in the foregoing stills and that all samples contained alcohol, some fit for beverage purposes by re-distillation; that he also examined the samples of mash seized at several of the above stills. Some of the mash contained alcohol and was fit for distillation.

Ruth Casey testified that she has charge of permits for the operation of stills in the office of the Supervisor of the Alcohol Tax Unit for the Northern District of New York; that she examined the records in the office of the Supervisor and found no registration of any of the foregoing stills, and no permit for the erection or operation of any of them.

Photographs were received in evidence describing scenes of the still seizures and of certain objects seized therein. The same are

not included in the record but are available for the inspection of the Court.

Miscellaneous Evidence

Howard Edwards, A. T. U. Investigator, testified that on November 27th, 1937, on a public highway north of Utica, he and other officers seized a Ford truck, owned and operated by Rocco Caruso, commercial plates No. 223–888, containing a load of non-tax paid alcohol concealed in said truck.

Joseph A. Steeley, Sergeant, N. Y. State Police, testified that on the evening of July 20, 1937, while he and another officer
92 were patroling the Herkimer-Utica Highway, Route No. 5, he saw a truck and a car very close to each other. He stopped the truck and the car and in the truck was a cone-shaped large vat, and some pipe fittings. The cone-shaped object looked like the top of a cooker. He arrested Enrico Ferro and Daniel DiJoseph, who were in the truck, because they did not have an automobile registration card. Nicholas Blase and Daniel LaBella were in the automobile. They stated that they were taking this piece of iron to the junk yard; that they were in the junk business.

The defendants objected to the above testimony on the ground that it did not tend to establish operation of a still at Schuyler Corners as charged in the indictment. Objection was overruled and exception taken.

Walter H. Cooley testified that he resided at 1423 Flagg Avenue, Utica, New York; that he knew Walter Melito six or seven years; that he talked with him by telephone and knew his voice; that in 1936 and 1937, Walter Melito came to his home; that Walter Melito gave him a card and phone number 2–6934, and that Melito told him "He had some good stuff"; that in September, 1937 Melito delivered to his home a gallon of non tax paid alcohol, for which payment was made in the sum of $4.00.

Vincenzo Correale testified as follows: That he owns and operates in partnership with Sam Grio, the Venezia Cafe, a pastry, soft drink, coffee, and ice cream shop located at 885 Bleecker Street, Utica, New York, telephone number 2–9865; that he has been operating this cafe since 1935 up to the present time; that among his patrons were Lorenzo Grimaldi, Salvatore Graniero,
93 whom he knew as "Fat," Nicky Nole, John Melito, Rocco Caruso, John Nole, Anthony Zappia, and that Nicholas Nole, Salvatore Graniero and Rocco Caruso did not play pinochle in said cafe; that he does not remember having seen any of the persons mentioned playing pinochle in his Venezia Kaffe.

He observed Salvatore Falcone in said cafe on two occasions; the first time he came seeking a contribution for the American

Red Cross and the other time for a contribution for a monument for Marconi.

He saw Joseph Falcone in his place of business; that he did not remember seeing Rocco Caruso and Joseph Falcone talking together.

Louis Steinberg testified that he resides in the City of Syracuse, New York, and that he is the proprietor of a cigar store there; that he has been in the illegal alcohol business since repeal and particularly during the years 1936 and 1937; that at one time during the summer of 1937, he bought from Nick Nole (appellant) fifteen cans of alcohol for which he paid $15.00 a can, which was delivered by Nick Nole to his home at 129 Standard Street, Syracuse, New York.

The witness further testified as follows:

The COURT. Well, did you go to Utica with Mr. Wallace?

The WITNESS. Yes, sir; I did.

By Mr. JOSELIT:

Q. And what did you do in Utica?

The COURT. Fix the time.

Mr. JOSELIT. All right.

By Mr. JOSELIT:

Q. Did you go to Utica with Wallace during the winter?

94 Mr. PRIOR. I object to counsel fixing the time.

The COURT. When was it that you went with him to Utica, as near as you can fix the time?

The WITNESS. I think it must have been during the early part of the Fall of 1936.

By Mr. JOSELIT:

Q. Well, did you buy some alcohol?

Mr. PRIOR. I object to it as leading.

The COURT. What did you do when you got there?

The WITNESS. We bought 18 cans of alcohol.

By Mr. JOSELIT:

Q. How much did you pay per can?—A. I don't remember exactly; I think it was around $13 or $14.

Q. When you went to Utica with Wallace, were you driving in his car or in yours?—A. In his car.

The COURT. What kind of a car was it?

The WITNESS. I don't remember.

Mr. PRIOR. What?

The WITNESS. It was a little Chevvy.

By Mr. JOSELIT:

Q. What model was it or type of car?—A. A Chevvy coupe.

Q. And on what street did you drive in Utica with Wallace in the Chevvy coupe?—A. On Bleecker Street.

By Mr. JOSELIT:

Q. And did you meet someone on Bleecker Street?

95 The COURT. Speak up good and loud, Mr. Steinberg.

The WITNESS. I met Joseph Falcone.

By Mr. JOSELIT:

Q. Now how long had you known Mr. Joseph Falcone?—A. Quite a few years.

By Mr. JOSELIT:

Q. Well, by "quite a few years," how many years?—A. Oh, about 6 or 7 years.

Q. And had you seen Mr. Joseph Falcone from time to time previous to that occasion?—A. Oh, I have seen him but I never talked to him.

Q. Well, did you see him in Syracuse?—A. Yes; I did meet him once in Syracuse.

Q. And when was that?—A. I cannot recall the time.

Q. Do you know the Indian Novelty Company on South Townsend Street in Syracuse?—A. Yes, sir.

Q. Did you see the defendant Joseph Falcone there?—A. Yes, sir.

Q. Did you have a talk with him?—A. No, sir.

Q. And had you seen him on other occasions?—A. I have seen him several times in Utica, but never talked to him.

Q. Now on this occasion during the winter of 1936 when you went there with Wallace, state whether or not you had a conversation with the defendant Joseph Falcone?—A. Yes, sir; I did.

Q. Where did you have the conversation?—A. Near a furniture store on the corner of Mohawk and Bleecker.

96 Q. When you say "near a furniture store," do you mean on the side walk or in the street or where?—A. On the sidewalk.

Q. Who was present?—A. Nobody, just myself and Mr. Falcone.

Q. Was Mr. Wallace present?—A. No.

Q. Did you park Wallace's Chevrolet coupe?

Mr. PRIOR. I object to his leading the witness.

The COURT. Yes.

By Mr. JOSELIT:

Q. State where was the——

Mr. PRIOR. (Interrupting.) It is all right to ask a leading question and say "all right" and then follow it up with something that puts the answer in his mind.

The COURT. Well, refrain from leading. Let him tell.

By Mr. JOSELIT:

Q. All right, state what occurred.—A. The car was parked in the middle of the block on Bleecker Street. Then when I saw Mr. Falcone I asked him whether or not he would know if he has any alcohol. He said he was not in the business and didn't have any. I asked him if he knew where I could get some. He said he couldn't tell me. So I am not sure, but I think I gave him a telephone number and asked him if he could place the call for me.

Q. Did he place the call for you?—A. Well, he went in.

Q. No; did he place the call for you?

Mr. PRIOR. I object to the question as leading.

97 The COURT. Yes; state what he did.

The WITNESS. I think I gave him the number and he called up a party for me.

By Mr. JOSELIT:

Q. What number did you give him?—A. I cannot remember.

Q. Where did you get the number?—A. I had the number.

Mr. PRIOR. I object to that as incompetent, irrelevant, and immaterial and hearsay.

The COURT. Overruled.

By Mr. JOSELIT:

Q. Mr. Steinberg, where did you get the number?—A. I think Wallace had that number and he gave it to me.

Q. That is what you think?—A. Yes.

Q. State what Joseph Falcone did.

The COURT. State where you got the number.

The WITNESS. I cannot recall. I had the telephone number in my book. I used to have several numbers.

By Mr. JOSELIT:

Q. Whose number was it?—A. It was somebody——

Mr. PRIOR. I object to that as calling for an improper conclusion.

The COURT. He may answer if he knows.

The WITNESS. I don't know any name of it, but I know I had a telephone number.

By Mr. JOSELIT:

98 Q. State what the defendant Joseph Falcone did after you had the con'ersation with him?—A. He called up the party and when the party came I went away with the fellow.

Q. Who was the party?—A. It was a young fellow.

Q. Describe him.—A. Oh, he was a young fellow about my size, blonde.

Q. Did you obtain some alcohol?—A. Yes, sir.

Mr. PRIOR. I object to that as incompetent, irrelevant, and immaterial.

The COURT. Overruled.
Mr. PRIOR. Exception.

By Mr. JOSELIT:

Q. How much?—A. 18 cans.
Q. Did you pay for it?—A. Yes, sir.
Q. How much?—A. Around $13 or $14 a can; I don't remember.
Q. What did you do with the 18 cans of alcohol?—A. I came back to Syracuse.
Q. What did you do with it? State what the young man did in your presence.—A. Oh, he took my car and went away and brought it in the car.
Q. Brought what in the car?—A. 18 cans of alcohol.
Q. Brought it where?—A. On Bleecker Street.
Q. At the corner of Mohawk?—A. No; he brought it down around——
Q. (Interrupting.) What happened with Joseph Falcone during that occasion?
Mr. PRIOR. I object to that.
Mr. JOSELIT. All right.

99 By Mr. JOSELIT:

Q. When he came out of the furniture store, did you talk with him?—A. With Joseph?
Q. Yes.—A. No, I didn't talk with him anymore.
Q. Did you see him?—A. I saw him in the store there, in the front.
Q. Did you see him telephone?—A. No. He went back in the office.
Q. In whose office?—A. In the store there.
Q. What store?—A. In the furniture store.
Q. What furniture store?—A. On the corner of Mohawk and Bleecker.
Q. Who operates it?—A. I don't know.
Q. Who was in it?—A. I don't know. I saw several people in there, but I did not know who they were.
Q. Did you see Joseph Falcone in there?—A. No, I saw him in the front. Then he went in there.
Q. Did you see him when he come out?—A. No. He didn't come out any more. He was in the store in the front.
Q. What time during that day did you have a talk with Joseph Falcone about alcohol?
Mr. PRIOR. I object to it as repetition; it has already been gone over.
The COURT. Just fix the time.
The WITNESS. I can't remember. It was late in the afternoon.

By Mr. JOSELIT:

Q. What was the weather at that time?—A. Pretty cold.

100 Q. Was there a blizzard?—A. There was a blizzard coming back.

Q. With the load?—A. Yes, sir.

Q. Were you asked this question at Albany, and did you make this answer?—A. No, sir. I didn't think of it.

Q. Wait a minute.

By Mr. JOSELIT. [Referring to Grand Jury minutes.]

Q. Were you asked this question?

"Question: Did you contact Joseph Falcone at the corner of Mohawk and Bleecker Street? Did you make this answer?

Answer: Yes, sir.

A. Yes, sir.

Q. Were you asked this question:

"Question: Are you able to tell the Grand Jury how you located him there on Bleecker Street?"

Did you make this answer:

Mr. PRIOR. If that same question were asked here, it would be objectionable as calling for an improper conclusion.

The COURT. Yes.

By Mr. JOSELIT:

Q. Were you asked this question:

"Question: Did you have a conversation with him?"

Did you make this answer: "Yes."

A. Yes.

Q. "I asked him if he had any alcohol for sale and he

101 told me they weren't doing anything for money, so I asked him if he would get someone for me to buy from, and he told me he would call up somebody."

Did you make that answer?—A. I think I did.

Q. You were asked this question:

"Question. Did he come out later."

Did you make this answer:

"Answer. Yes."

Were you asked this question?

"Question. Did you have a conversation with Joseph Falcone?"

Did you make this answer?

"Answer. He told me somebody was coming over to see me."

Q. Do you remember that?—A. I must have, if I said it.

Mr. Steinberg, are you sure that you gave the defendant Joseph Falcone a telephone number?

Mr. PRIOR. I object to it as improper in form and secondly as leading, and third, as already having been gone over.

The COURT. Overruled.
Mr. PRIOR. Exception.
The WITNESS. I cannot tell for sure.

By Mr. JOSELIT:

Q. Your answer is what?—A. I cannot tell for sure; I cannot remember.

Mr. JOSELIT. Your witness.

Cross examination by Mr. PRIOR:

Q. May I see the paper from which you read to the witness the questions and answers?

102 Mr. JOSELIT. Yes. Will Your Honor pardon me just a minute.

By Mr. PRIOR:

Q. Mr. Steinberg, let me get clear in my mind: You say you have known Mr. Joseph Falcone for some time?—A. Yes, sir.

Q. But you have never had conversations with him?—A. No, sir.

Q. And on this occasion in 1936 you went to Utica with Wallace?—A. Yes, sir.

Q. And you met Mr. Joseph Falcone near the cigar store at Mohawk and Bleecker Street?

Mr. JOSELIT. That is objected to.

Mr. PRIOR. I think it was a furniture store.

Mr. JOSELIT. That's right.

The WITNESS. Yes, sir.

By Mr. PRIOR:

Q. And at that time you asked him where you could get some alcohol?—A. Yes, sir.

Q. And he told you that he was not in the business?—A. Yes, sir.

Q. And you asked him if he knew anybody who would sell it to you and he said he did not know anybody, is that so?—A. Yes, sir.

Q. Then you had in your book a telephone number?—A. Yes, sir.

Q. And you asked him if he would call that number for you, is that right?—A. I think so.

Q. You didn't ask him to get alcohol from that number, did you?—A. No; I didn't say.

Q. And he called the number for you?—A. Yes, sir.

103 Q. And that is the only transaction you have had with him?—A. Yes, sir.

Mr. PRIOR. That's all.

Redirect examination by Mr. JOSELIT:

Q. Mr. Steinberg, in answer to my last question, didn't you say you weren't sure?—A. As I say, I think so.

Q. Now, are you sure or are you not sure that you handed to Joseph Falcone a telephone number?—A. I think I did; I am not positive.

Q. You are not positive?—A. No.

Q. So when you answered Mr. Prior's question you were not positive?—A. No, not positive.

Q. Is that right?—A. Yes, sir.

Q. Did you use the telephone yourself to get alcohol?—A. No, sir.

Q. And you received these 18 cans after the defendant Joseph Falcone went in and made the call at your request?—A. Well, when I met that fellow.

Q. What is that?—A. Well, when the fellow came over.

Q. Well, did the fellow come over before Joseph Falcone called?—A. No, after I told him.

Q. Did he come over after he called?—A. Yes.

Q. And how much time elapsed between the call and the delivery of the 18 cans?—A. Oh, probably about a half an hour or so.

Mr. JOSELIT. That's all.

104 Recross examination by Mr. PRIOR:

Q. Mr. Steinberg, you didn't tell Mr. Joseph Falcone to call up for alcohol, did you?—A. No, I didn't say anything about alcohol.

Q. Just asked him to call the telephone number for you?—A. Yes.

Mr. PRIOR. That is all.

Redirect examination by Mr. JOSELIT:

Q. Did you have the conversation with Mr. Joseph Falcone about alcohol before the call?—A. Yes, I did.

Mr. PRIOR. I object to that, he said he did and Mr. Joseph Falcone was not in the business.

The COURT. I will allow him to answer.

Mr. PRIOR. Exception.

Mr. JOSELIT. That is all.

Mr. PRIOR. That is all, Mr. Steinberg.

Mr. BYRNE. No questions.

Edward A. Barrett, testified that he has been the District Manager of the National Grain Yeast Company since December 6, 1937, and that he had bought out Nicholas Nole's yeast business in October, 1938. While the witness was District Manager for

the National Grain Yeast Company, John Nole was a jobber dealing in this yeast in the Utica area.

Cross examination by Mr. Byrne. John Nole made daily reports to the National Grain Yeast Company and these reports were turned over to the proper Government officials.

Exhibit "C" received in evidence was a folder containing the daily reports of the sales of yeast made by John
105 Nole. Said reports contained the names, addresses and amounts of yeast sold by John Nole.

The City of Utica and vicinity were not serviced from the Crystal Lake, Illinois factory, but all the yeast shipped to John Nole was from the factory in New Jersey. John Nole was employed by the witness' company during February 1938, and continued to work on a salary basis until Nole was indicted, when his employment with the company ceased.

On the 1st day of March 1938 the record showed that there were twenty-five (25) individual sales of yeast on that day by John Nole for a total of one hundred and two (102) pounds, and the largest amount to any one person was ten (10) pounds. On all sales of over five (5) pounds of yeast to one person, it was necessary to make a report to the Government.

Exhibit "D" received in evidence, which were the forms which John Nole made up and furnished the Government on sales of yeast of over five (5) pounds. The witness had never received any complaints from the Government about John Nole.

Cross examination by Mr. Joselit, of Witness Joseph P. Coleman, A. T. U. Investigator, sworn by the Defendant, John Nole. Testified that defendant's exhibits C & D, which were reports filed by John Nole, purported to cover all of his sales of yeast amounting to five pounds or over, do not show any sales of yeast to Salvatore Morreale or George Blake during the months of February and March 1938, nor do they show any sales of yeast in kegs.

Virginio Ficchi, Utica, New York, testified that he sold
106 sheet metal to Joe Bonanza (on trial) for several years, and he understood Joe Bonanza was in the business of fixing furnaces. He stated that he did not build stills or columns and does not know what a still looks like. A certain man whom he could not identify gave him a sketch and he built from the sketch what he later knew to be a column.

Victor M. Perretta, testified that he lives near Canton, New York, and is a cattle buyer. He goes to New York City to sell the cattle and on two occasions John Andrello, his helper, picked up certain kegs and delivered them to the Utica Freight Forwarding Company. Nicholas Nole (appellant) was the owner of the freight company. The kegs looked like the same size as nail kegs, but did not know whether they contained yeast or not. Nicholas

Nole and John Nole helped unload the kegs on the first occasion. The kegs were stored in a garage building, the second building from Catherine and Kossuth Streets, Utica.

Rome O. Chandler, A. T. U. Investigator, testified that Enrico Garcia told him he was working for Joe Bonanza. That on July 6, 1937, George Bonanza picked up a man in working clothes on the corner of Mohawk and Bleecker Street and drove north. That on July 12, 1937, he saw Daniel LaBella and Joe Bonanza talking with another man at the home of Daniel LaBella. He saw Lawrence Grimaldi talking to Nicholas Nole at 1500 Broad Street, Utica, New York, on July 15, 1937, where his freight business was located. On July 21, 1937, Daniel LaBella and Joe Bonanza went to the home of Nicholas Blase, and then the same car in which they had been riding was driven to 632 Rosemont Street to the home of Salvatore A. Graniero. Graniero entered the car and it was driven to 526 Elizabeth Street, the home of Enrico Ferro. The
107 driver of the car and Graniero entered Ferro's home, remained about one-half hour, came out and drove to 721 Eagle Street, the home of Nicholas Blase. Blase entered the car. It was driven to 632 Rosemont Street. Blase and Graniero entered the premises, 632 Rosemont Street, Graniero's home.

On July 22, 1937 Nicholas Nole and Lawrence Grimaldi were talking on 1500 Broad Street the office of the Utica Freight Forwarding Company. On August 4, 1937 Salvatore A. Graniero, Joseph Bonanza and George Bonanza were standing and talking in front of 1104 Nielson Street the home of Joseph Bonanza. On September 3, 1937 George Bonanza was at the wheel of the automobile parked in front of 243–245 Bleecker Street, Utica, a bank building, Joseph Zapetti and Frank Soldano were in the car talking with him. On November 7, 1937 a person unknown to the witness drove a car from the home of John Melito, 718 Lansing Street to the home of Sam Grio, 1017 Ontario Street. The driver entered the house, came out and talked to Grio on the street. On November 23, 1937, Joseph Bonanza and Daniel LaBella were working on an automobile at 767 Lansing Street, the home of Daniel LaBella. On December 1, 1937, Nicholas Fabrizio drove to Joseph Bonanza's home, 1104 Nielson Street, and went into the house. On December 17, 1937, Nicholas Nole drove in an automobile to 632 Rosemont Place, the home of Salvatore Graniero, and talked with Graniero and another man for several minutes in the driveway. On the same day Nicholas Nole at Jay and Kossuth Streets entered an automobile driven by Enrico Ferro (Garcia). They drove over various streets in East Utica. On March 22, 1938, Frank Milozzo and Vincent Marrone were standing together

in a restaurant at Market and Catherine Streets. They
108 waved to the witness. On August 5th, 1938, the witness observed Sam Grio driving his car 2P 287 and go to the home of John Melito at 718 Lansing Street and stay in Melito's home two hours. On August 8, 1938, the witness saw Enrico Garcia and Joe Bonanza standing talking on Park Avenue. On August 16, 1938, between 7:30 A. M. and noon, the witness saw car bearing license plates 2P 287 park in front of 718 Lansing Street and then go to the Venezia Kaffe.

Howard Edwards, A. T. U. Investigator, testified that in company with Alton Clay went near the premises 1500 Broad Street in which the Utica Freight Forwarding Company is located. The witness testified that Nicholas Nole told him to call off his men because he was loading flour at his place and not sugar and that if he did not believe him to come to the Utica Forwarding Company and see for himself. The witness entered the office and found on the desk a design for a new yeast wrapper. On it was printed "The Acme Yeast Company." On August 31, 1938, he saw a Pontiac coupe parked in front of Venezia Caffe and saw Nicholas Nole and Lawrence Grimaldi talking. In the latter part of May 1937, the witness saw Lawrence Grimaldi and George Bonanza talking at the home of George Bonanza, 1400 Burrstone Road.

Alton Clay, A. T. U. Investigator, testified that independent of observations and locations and places where stills were seized he made the following observations:

On September 24, 1937, he observed Salvatore Graniero at premises 632 Rosemont Place, his home, and shortly thereafter a car drove in the driveway and Graniero go into the house. The
109 lights in the house were extinguished, and the car was driven into the garage. Ten minutes later the same car backed out without any lights and drove to 721 Eagle Street, the home of Nicholas Blase. Later the witness saw Salvatore Graniero drive to premises at 721 Eagle Street and enter the house.

On June 6, 1937 Joseph Bonanza went to his brother's home, George Bonanza, 1400 Burrstone Road.

On June 3, 1938 the witness observed Enrico Ferro with George Bonanza at 1104 Neilson Street, the home of Joseph Bonanza.

On September 17, 1937, the witness observed Elmer Pflanz driving his car to 1104 Neilson Street and Pflanz entered the premises.

On July 1, 1937 the witness observed Nicholas Nole parked in front of the home of Enrico Garcia and both of these men were talking inside the car. The witness saw Emil Maciol associating with George Bonanza. The witness testified that the car which he saw Elmer Pflanz driving was parked a little way away from where the Russia still was seized.

Cross-Examination

The witness testified that the Venezia Kaffe is located in one of the thickly populated business sections of Utica. There is theatre directly across the street from the cafe. There is a barber shop next door. Adjoining the cafe there are many stores. The witness testified that in all of these observations which he testified to there were no violations of law.

Walter F. Martin, A. T. U. Investigator, testified that during the period he was engaged in making investigations in the Utica area, he made certain investigations independently of still seizures,
and from time to time, he kept records and notes in his own
110 handwriting, of his observations. He used his records and
notes and memoranda to refresh his recollection during his testimony.

He testified that on June 11, 1937, at 4:40 p. m. on Bleecker Street, near Third Street in the City of Utica, he saw Salvatore Falcone in conversation with Lawrence Grimaldi. On July 20, 1937, at 4:37 p. m., he saw Joseph Falcone enter the Venetia Cafe and in a few minutes, come out in company with two men whom the witness did not know. On the same day at 5:15 p. m., he saw Joseph Bonanza come out of LaBella's house at 767 Lansing Street, enter his car, license No. 2P 88-65. LaBella came out and talked with Bonanza a few minutes, and Bonanza left.

On July 24, 1937, at 10:35 a. m., he saw John Melito go to premises at 1623 Mohawk St., and drive his car into the driveway. He entered the door at the side. Joseph Falcone opened the door for him. This is Joseph Falcone's residence. A few minutes later, another man who was not a defendant, arrived, and went into the house and at 10:46 a. m., a man named Sam Grio (named as co-conspirator but not indicted) arrived and parked his car in front of the place and went in.

On August 24, at 7:35 p. m., he saw Joseph Falcone drive his car, 3P 262, into the driveway of premises at 1017 Ontario Street. For about twenty minutes he was in conversation with Sam Grio. This is Grio's residence. At 11:10 p. m. on the same day, he saw Enrico Ferro (on trial) go to the home of Joseph Bonanza, 1104 Neilson Street, and enter the house. The witness did not see anyone talk to him at that time.

On September 15, 1937, the witness was on Bleecker Street with Investigator McGuire. He saw several truck loads of sugar in
front of Frank Bonomo's wholesale grocery company. The
111 sugar was being transferred from the trucks, some to
Bonomo's truck and the balance of the load into the warehouse of Bonomo. Joseph Falcone came, and went in Bonomo's store, remained about eight minutes, then came outside. The

truck driver was having a difficult time entering the narrow driveway and Joseph Falcone was indicating with his hand whether to go to the right or left. Joseph Falcone stayed there about twenty minutes then went to his car which was parked near the corner of Third and Bleecker Streets.

On September 16, at 9:05 p. m., witness saw Joseph Falcone stop his car in front of the Venetia Cafe. Sam Grio came out to the curb and had a conversation with him.

On September 27, at about 7:30 p. m., witness saw Sam Grio's car parked in the driveway of his home. Next to it was parked Joseph Falcone's car and back of that was the car of another man not a defendant. At 7:40 p. m., Grio's car was backed out, Joseph Falcone's car was backed out and driven around the block. The witness was walking around the block. Joseph Falcone's car came around without lights, circled the block entirely and went back into the driveway. Joseph Falcone got out and started walking up Ontario Street in the direction of the witness' parked car about a block away. As Joseph Falcone approached the car of the witness, the witness drove away very quickly. Joseph Falcone turned around and walked back in the direction of 1017 Ontario Street.

On September 28, 1937, the witness saw Walter Melito drive from the premises at 718 Lansing Street to 1238 South Street. Walter Melito got out of his car, carrying a five gallon can which appeared to be heavy, and which was partially wrapped in a brown paper. He took it into the premises at 1238 South Street.

112 On October 15, the witness observed Walter Melito drive to premises at 236 Whitesboro Street; he took from his car a package containing a one gallon jug and took it into the premises.

On October 17, 1937, the witness observed Walter Melito go to the premises at 24 St. Joseph Street and deliver a gallon jug in a paper bag.

On October 17, at 9:55 a. m., the witness saw Salvatore Falcone drive an automobile, 2P 1, and come to the premises 718 Lansing Street, the home of John Melito. A few minutes later, Sam Grio came to the premises in car 2P 543, and entered the house. Another man, whose name the witness did not know, came within a few minutes in a car, 2P 8113, and ten minutes after, Joseph Falcone came in car 3P 262.

On October 20, 1937, the witness observed Walter Melito driving car 8P 8603, go to 24 St. Joseph Street, at which time he appeared to take in a gallon jug. On the same date at 6:30

p. m., the witness observed Walter Melito go to 1204 Bleecker Street, at which time he appeared to deliver a gallon jug.

On October 29, 1937, at 7:15 p. m., the witness observed Walter Melito drive from 718 Lansing Street to a little street known as George's Place. At this time, Walter Melito took a package into the premises at the corner of George's Place and returned to his car with another empty jug.

On November 11, 1937, at 3 p. m., the witness observed Rocco Caruso go into the Venetia Cafe.

On October 14, at 5:46 p. m., the witness observed Rocco Caruso and Paul Mira standing in a doorway about two doors from the Venetia Cafe, holding a lengthy talk or conversation.

113 On November 17, at 4:38 p. m., the witness observed John Melito in the Utica Freight Forwarding Co., 1500 Broad Street, in conversation with Nicky Nole.

On November 17, at 5:40 p. m., the witness went into the Venetia Cafe to get a thermos bottle of coffee. He saw Rocco Caruso and Joseph Battaglia talking at a table in the Venetia Cafe. At 10:55 p. m. on the same day, the witness observed Rocco Caruso driving out of the driveway at 718 Lansing Street with a Ford cattle truck, license 223-888. The Melitos live at that address.

November 23, 1937, at 6:42 p. m., the witness observed Rocco Caruso and Paul Mira come out of the Venetia Cafe and come down Bleecker Street together. They separated at the next corner.

On November 26, 1937, at 5:20 p. m., Rocco Caruso came out of the Venetia Cafe and had a conversation with Sam Grio who had just driven up in front of the cafe in his car.

On November 29, 1937, at 9:04 p. m., the witness saw Salvatore Falcone meet Sam Grio on Bleecker Street. They had a conversation of about five minutes.

On January 10, 1938, the witness observed Paul Mira go to the New York Central station and drive away a few minutes later with Joe Battaglia.

On January 17, at 7:30 p. m., the witness saw Joseph Falcone driving his car to a point just west of the Venetia Cafe on Bleecker Street. Joseph Falcone got out and went inside the cafe. The witness did not see Joseph Falcone talking to anybody.

On January 21, at 6:57 p. m., the witness saw Joseph Falcone enter the Venetia Cafe; at 7:10 p. m., Salvatore Graniero
114 entered; at 7:12 p. m., John Melito entered, and a few minutes later the witness saw these three persons talking at a table in the cafe.

On March 22, 1938, at 5:15 p. m., the witness observed Frank Milozzo and Vincent Marrone in a Chevrolet pick-up truck on Catherine Street, near Albany.

Cross-examination (Walter F. Martin)

The endeavor of the witness during this time was to find out any violations of law that any of these people were committing. So far as was apparent in any of the above observations of the witness, there were none. Salvatore Falcone and Lorenzo Grimaldi (both appellants) are married to sisters.

On June 11, 1937, the witness saw Salvatore Falcone talking to a middle-aged man whom he believed, at that time, to be Lawrence Grimaldi. The witness afterwards learned the identity of Lawrence Grimaldi. The next time that the witness saw Salvatore Falcone was October 17th at home of John Melito, five months later. On November 29, he saw him on Bleecker Street, talking to a man named Sam Grio. The witness has no further note or memoranda about observations of Salvatore Falcone. His independent recollections of seeing him is that he saw Salvatore Falcone from time to time on the streets of Utica around Mohawk and Bleecker Streets, and Third and Bleecker Streets. Witness has seen him on the street a good many times. The only times witness has a record of seeing Salvatore Falcone were three; in June, October and November. He does not think he testified on direct examination to having seen Salvatore Falcone on October 17th. He has no distinct recollection of having seen him again. Witness made no investigation of the relation-
115 ship existing, which might have occasioned visits of Joseph Falcone to Sam Grio, or of Sam Grio to Joseph Falcone.

Witness further testified that Frank Bonomo conducts a wholesale grocery in the City of Utica. The witness, in his investigation of matters affecting alcohol tax, investigated somewhat Bonomo's business. He sells sugar and flour and macaroni, and other products generally found in a wholesale grocery. On the date, September 15, 1937, that the witness testified that a load of sugar was being transferred or shipped into Mr. Bonomo's place, part of the load was placed in the warehouse of Bonomo and part placed on a truck. One truck was unloading sugar at the warehouse and another was in the street. Bonomo's truck was on the street. The truck containing a load of sugar was in the driveway. It backed into the driveway after putting about 100 bags on Bonomo's truck. The other part of the cargo was placed in Bonomo's warehouse. Witness testified he observed Joseph Falcone, while the truck was backing into the driveway, indicating to

the driver with his hands how much room he had to back into the driveway.

Witness further testified the Venetia Kaffe is situate in the heart of the Italian section of Utica on Bleecker Street. There is a theatre, dry cleaning place, barber shop, and other places of business right in the immediate vicinity. During the evening, it is a place that is fairly congested with parked cars.

Redirect Examination

On September 15, 1937, in the Bonomo's truck, at the Bonomo warehouse, the witness saw approximately 100 bags of sugar branded "Sucrest." The witness could see the date symbols stamped on only two bags; one was "13–I–7"; the other was "½ 9–I–7."

116 John R. Thomas testified that he is acting manager of the People's Branch, First Citizens Bank and Trust Company of Utica. He identified the following Government exhibits from the bank files which were received in evidence:

Exhibit 396—Signature card bearing name Salvatore Falcone, Attorney for Joseph Falcone.

Exhibit 397—Signature card of Joseph Falcone.

Exhibit 398—Power of Attorney from Salvatore Falcone, dated March 20, 1936, to Joseph Falcone.

Exhibit 399—Power of Attorney from Joseph Falcone to Salvatore Falcone, dated March 1, 1937.

Exhibit 400—Signature card of Salvatore Falcone & Bro., dated December 7, 1931.

Exhibit 401—Signature card of Rubin Sales Company, Inc., dated March 31, 1937.

Exhibit 402—Resolution of Rubin Sales Company, Inc., signed by Victor Falcone, Secretary, dated March 31, 1937.

Exhibit 403—Signature card of Rubin Sales Company, Inc., dated June 30, 1937. Names Salvatore Falcone, Treasurer, and Joseph Falcone, Secretary.

Exhibit 404—Corporate resolution of Rubin Sales Company, Inc., dated June 30, 1937, and signed by Joseph Falcone, Secretary.

Exhibit 405—Certified check dated March 1, 1937, payable to Turner Brothers, made by Joseph Falcone, Wholesale Grocer, Check #1.

Exhibit 406—Certified check dated March 1, 1937, payable to Turner Brothers, made by Joseph Falcone, Wholesale Grocer, Check #6.

117 Exhibit 407—Certified check of Joseph Falcone, Wholesale Grocer, dated March 31, 1937, payable to First Citizens Trust Company, made by Salvatore Falcone, Attorney for Joseph Falcone.

Exhibit 408—New York Draft purchased by Exhibit 407 by the First Citizens Trust Company, March 31, 1937, payable to Greenspan Brothers.

Exhibit 409—Mr. Thomas stated that this credit ticket was part of Exhibit 408, and draft #P8816 was charged against the account of Joseph Falcone, Wholesale Grocer.

Exhibit 410—Certified check, No. 27, on account of Joseph Falcone, payable to Greenspan Bros., signed by Salvatore Falcone, Atty.

Exhibit 411—Certified check dated April 23, 1937, payable to Turner Brothers, made by Joseph Falcone, Wholesale Grocer, check #57.

Exhibit 412—Certified check dated June 27, payable to Turner Brothers, made by Joseph Falcone, Wholesale Grocer, check #88.

Exhibit 418—Recordat facsimile check, Salvatore Falcone & Bro., No. 1950, dated September 21, 1937, signed by Salvatore Falcone & Bro., by Joseph Falcone, payable to "A. J. Motor Express," amount $48.82.

Exhibit 420—Recordat facsimile check of Joseph Falcone, Wholesale Grocer, check #31, dated April 15, 1937.

Exhibit 420A—Recordat facsimile check of Joseph Falcone, Wholesale Grocer, check #524, dated April 20, 1937.

118 Exhibit 420B—Recordat facsimile check of Joseph Falcone, Wholesale Grocer, check #111, dated Sept. 21, 1937.

Exhibit 421—Deposit ticket of Joseph Falcone, Wholesale Grocer, on April 24, 1937, deposit of check in the sum of $1,500.00, Oneida National Bank.

Exhibit 422—Deposit ticket of Joseph Falcone, Wholesale Grocer, May 22, 1937, deposit of check in the sum of $1,500.00, Oneida National Bank.

Exhibit 423 A-to-K—Recordat facsimiles of statements of the account of Joseph Falcone, Wholesale Grocer, from Feb. 2, 1937 to Dec. 31, 1937.

Exhibit 413—Certified check dated September 9, 1937, payable to the order of Sucrest Corporation, made by Joseph Falcone, Wholesale Grocer, check #103 in the sum of Five Thousand Dollars.

Exhibit 414—Facsimile check dated September 9, 1937, made by Salvatore Falcone, Retail Wines & Liquor, signed by Joseph Falcone, Attorney, check #2783. This was a loan to Joseph Falcone by Salvatore Falcone in the sum of $5,000.00.

Exhibit 415.—Certified check dated September 13, 1937, payable to the order of Sucrest Corporation, made by Joseph Falcone, Wholesale Grocer, check #107. This is in full payment of all the sugar purchased from Turner Brothers which amounted to 8,600 bags. Amount of check $4,702.00.

119 Exhibit 416—Ledger sheet with Exhibit 416-A showing a loan in the sum of $80.00 to Lorenzo Grimaldi, which note was signed or endorsed by Joseph Falcone, dated May 24, 1938. The photostat was received in evidence without any objection on our part.

He further testified that in the year 1937 the sum of the total deposits of Joseph Falcone, in his checking account, was $90,062.19. At no time was there more than $13,152.48 in the account.

It was an active checking account. The balances fluctuated, at times amounting to between two and four thousand, five and six thousand dollars, and at other times between seven and eight thousand dollars. At the end of the year the balance was $1,930.87. Witness also testified during the year 1938 the total deposits in this account amounted to $2,500.00.

Harry R. Gosling testified for the Government as follows: That he was the Vice-President and Cashier of the Oneida National Bank and Trust Company of Utica, New York.

He identified the following Government Exhibits which were received in evidence.

Exhibit 425 was a signature card of the firm of Alberico & Funicello.

Exhibit 426 was a check dated April 24, 1937, signed Alberico & Funicello by Henry Alberico, check #15898, payable to Joseph Falcone.

Exhibit 427 was a check payable to the order of Joseph Falcone on May 15, 1937, check #15976.

He further testified that the account in his bank was an
120 active checking account having been opened on the 18th day of July 1933, and that the account at the present time was still active. He also identified a check payable to Joseph Falcone in the sum of $1,000.00, which check was marked "Defendant—Joseph Falcone—Exhibit L."

Ludwig Young testified that he was head bookkeeper of the First Trust & Deposit Company of Syracuse, and that he identified the following Government's exhibits which were received in evidence:

Exhibit 428 was a signature card dated July 17, 1933, of Nicholas Nole.

Exhibits 429a-to-c, inclusive, were the original ledger sheets of the checking account of Nicholas Nole from September 12, 1936, to August 9, 1938, when the account was closed. The acct. was closed because he was a bad risk.

Exhibits 430 (a-to-j) were photostatic copies of checks of Nicholas Nole.

Roger J. Simmott testified that he was the Assistant Clerk of the Industrial Bank of Utica, and identified the following Government's exhibits which were received in evidence:

Exhibit 431 was a signature card of the Utica Freightway Forwarding Company by Nicholas Nole.

Exhibits 432 (a-to-b) are the records of checks on account of Utica Freightway Forwarding Company.

Exhibit 433 was the ledger sheet for the Utica Freightway Forwarding Company.

121 Ephraim Sudarsky testified that he was the president of the Atlantic Yeast Company and that he had certain business transactions with Nicholas Nole in May 1937. That he shipped yeast to Nicholas Nole (appellant) to the City of Utica and to the City of Syracuse and identified Rocco Robertaccio as the person who was with Nicholas Nole when they came to his office to secure a new design for a yeast wrapper.

Nicholas Nole brought to his office a design for a yeast wrapper (Acme Yeast Company) which Nole desired to have placed on the yeast which he had purchased. That Nicholas Nole purchased 8,300 pounds of yeast at nine cents a pound during July and August 1937, which were wrapped in wrappers of Acme Yeast Company.

Rocco Robertaccio testified that his father wns real property on Jefferson Avenue and that he is second cousin to Nicholas Nole and that he went with Nole to the Atlantic Yeast Company. The yeast was stored at the property owned by his father. The Acme Yeast Company was registered in the office of the County Clerk under witness's name but the real owner was Nicholas Nole.

Henry Moscowitz testified that he and his father ran the Continental Yeast Company and imported yeast from Hungary. He is sole importer of "K-M" keg yeast. He does not know Nicholas Nole and does not know Perretta. An order was placed with him for 3,000 pounds of keg yeast and he shipped it to Utica Freight Forwarding Company by Luckman Freight Forwarding Company. Payment was made by cash for the yeast. The name given by purchaser was "H. Wilde, Harrison Street, Syracuse, New York."

122 David Rosen testified that he is the General Manager and Salesman of the Atlas Can Company. He has known Henry Alberico (appellant) for several years. He could not produce his 1936 books because they were mislaid or lost, but stated from recollection that Henry Alberico bought about 600 five-gallon tin cans a week from June 1936 to August 1937, approximately 25,000 cans.

He identified the following Government's exhibits which were received in evidence:

Exhibit 440 was a statement of the sales made from the Atlas Can Company to Alberico & Funicello from August 1937 to March 5, 1938, showing sales of 5,500 cans.

Exhibits 441 (a-to-e) were invoices of the Atlas Can Company to Alberico & Funicello.

Exhibit 442, ledger sheet and invoice from Atlas Can Company to Nicholas Nole June 17, 1938 to August 15, 1938, amounting to 1,440 cans.

He further testified that his concern also sold cans to F. Bonomo and Company, wholesale grocers of Utica, New York.

Cross-Examination

The witness testified that he met Mr. Alberico in June 1936 as a result of the witness calling on the firm of Alberico & Funicello. That at the time said firm were buying cans from other concerns and that the witness had two other customers in Utica besides Alberico & Funicello. That the witness's concern sells cans in New York State, Pennsylvania, Maryland, Washington and Connecticut. That all of the transactions which the witness had with Alberico & Funicello were honest and above board. That
123 there were no cash sales but that the cans were shipped on credit and that there was nothing unusual in the fact of wholesale grocers buying tin cans.

Joseph B. Turner, Jr., testified that he is president of the sugar brokerage company of Turner Brothers, located at 120 Wall Street, New York City, New York. His business is selling for the various refineries, and he is paid a commission by the refineries.

He identified the following Government's exhibits which were received in evidence.

Exhibit 444 was a buyer sheet which had a record of each order and sale.

Exhibit 445 (a-to-z) inclusive were daily records of sales.

Exhibit 446 was the buyer's sheet of Joseph Falcone, Utica, New York.

Exhibit 447 (a-to-f) inclusive was the daily record of sales of Joseph Falcone from March 1, 1937 to September 14, 1937, during which time he bought 8,600 bags of sugar.

Exhibits 405, 406, 411, 412, were certified checks of Joseph Falcone, wholesale grocer, 556 Bleecker Street, Utica, New York, to Turner Brothers. On April 8, 1937 there was an entry of 2,000 bags to be picked up on two separate dates, the first thousand bags to be picked up on or before April 12, 1937, and the remaining on or before April 19, 1937. The first load was picked up on April 25th, 1937 and the other load was canceled.

That in 1937 Oscar J. Brucker was a sub-broker in the City of Utica, New York. Mr. Turner identified trade let-
124 ters of Turner Brothers sent out by his firm to Joseph Falcone, marked Defendant's Exhibits M, N, O, and P.

Mr. Turner also identified Defendant's Exhibit Q which was a letter sent by Oscar J. Brucker urging Joseph Falcone to buy immediately two thousand bags of sugar because prices were going up.

Cross-examination

Joseph Falcone during 1937 was a jobber in sugar. During 1937, from March 1937 and for some months thereafter it was not unusual for large purchases of sugar to be made by jobbers. Defendants' Exhibits N, O, and P are market letters sent to Mr. Joseph Falcone and others. Defendants' Exhibits (N, O, and P) are solicitations for sugar orders.

Samuel Gardner testified that he is the Credit and Office Manager or the Sucrest Corporation, sugar refiners, with offices at 120 Wall Street, New York City; he testified that he received certain orders from Turner Brothers, sugar brokers, for sugar to be delivered to Joseph Falcone. He identified certified checks of Joseph Falcone in payment for the sugar. (See Government's exhibits 413 and 415.)

Stella Bieniak testified that she is office manager and bookkeeper for the firm of P. F. Scheidelman & Sons, Inc., of Utica, N. Y. She identified copies of sixteen invoices taken from the files of her company showing sales of one thousand bags of sugar to Nicholas Nole (appellant) between April 27, 1938 and September 23, 1938. She identified the defendant Nicholas Nole as the purchaser of this sugar. The above invoices are Government exhibits 459 (a-to-n).

Joseph Damsky testified that he was one of the firm of
125 E. Simon Damsky, Wholesale Grocers and Sugar Jobbers, at 404 Whitesboro Street, Utica, New York. That in his regular course of business he sold quantities of sugar; that sales of sugar were made to the firm of Alberico & Funicello during the year 1937 and up to and including October 4, 1938, as shown by Exhibits 466–467.

Cross-Examination

The witness has known and done business with the firm of Alberico & Funicello for the past twenty (20) years; that he knows the firm of Alberico & Funicello are Wholesale Grocers, and that the firm of E. Damsky & Son are large jobbers in sugar and sell to approximately fifteen (15) Wholesale Grocers in the City of Utica, and that the witness's firm has been selling sugar to the firm of Alberico & Funicello for the past twenty (20) years. That the witness knows that the firm of Alberico & Funicello sell and distribute generally to wholesalers and retail-

ers in the City of Utica and in the surrounding territories. That at the time of the trial, the firm of Alberico & Funicello were purchasing about 7,500 pounds of sugar per week from E. Damsky & Son. That the balance of 4,200 bags of one hundred pounds each of sugar purchased by the firm of Alberico & Funicello is not an unusual amount. That the witness's firm handles all different brands of sugar, namely, Jack Frost, Domino, Sucrest, Columbus, and a dozen other brands.

Salvatore Bonomo testified that he is Secretary and Buyer of the firm of F. Bonomo and Co., Wholesale Grocers doing business in the City of Utica; that his firm, during the year 1937, purchased from Joseph Falcone, 5,707 bags of sugar; that payment was made by check to Joseph Falcone. He identified
126 invoice bills rendered his firm by Joseph Falcone during the period from March 11, 1937 to September 17, 1937. They are in evidence as Government's Exhibit 468. He identified canceled checks of his firm, payable to Joseph Falcone in payment for the sugar, amounting to $29,084.65. They are in evidence as Government's Exhibit 469. He identified invoices showing sugar purchased by Alberico & Funicello from his firm during a period from October 19, 1937 to December 11, 1937. They are in evidence as Government's Exhibit 470. Bonomo's firm sold to Joseph Falcone in 1937 $1,900.00 of Italian groceries.

In addition to purchases of sugar from Joseph Falcone, his firm purchased 219 100-lb. bags of sugar from E. Simon Damsky & Son, Wholesale Grocers and Sugar Jobbers of Utica, New York, and 100 100-lb. bags of sugar from Minford Company, Sugar Jobbers of New York City. He identified invoices showing sugar purchased by his firm from E. S. Damsky & Son. They are in evidence as Government's Exhibit 471 A to C. At this time during the trial, the defendant Joseph Falcone produced his ledger sheet of his account with Frank Bonomo & Co. It was placed in evidence as Government's Exhibit 473.

Cross Examination

Witness testified that the average profit on a 100-lb. bag of sugar is ten to fifteen cents.

In answer to questions from the Court he testified that the average sales of sugar for his company were 30 to 40 bags per week for year 1937, and 25 bags per week for year 1938.

He also testified that he did not sell Alberico & Funicello any sugar during the years 1935, 1936 and 1938.

Government rests.

127 *Motions*

THURSDAY MORNING, JUNE 8, 1939.

The COURT. Are there any motions that Counsel wish to make?

Mr. PRIOR. If the Court please: In behalf of the Defendant Joseph Falcone I move for a dismissal of the indictment and the discharge of the defendant on the ground that the Government has failed to prove a case; the Government has failed to prove a prima facie case, and that the Government has failed to establish the allegations of the indictment.

Would Your Honor care to hear me upon that motion?

The COURT. Well, that is up to you.

Mr. PRIOR. I would like to be heard.

If the Court please: The indictment in this case charges the Defendant Joseph Falcone, as the others, with the crime of conspiracy. It alleges no overt act upon his part.

As Your Honor knows, we sat here for, I think, until the fourth week of this trial before his name was mentioned in the evidence.

Now I have before me my original trial notes, and I don't want to bore Your Honor because you may be more familiar with it, having reviewed it, than even I could be at this time; I have made no new notes, and I am reading from my notes, and very very brief, first, the evidence was given first on the 31st of May. The first time that the name of the Defendant Joseph Falcone was mentioned in this case was by the Witness Lewis Steinberg. He testified here on the 31st of May, and he testified that on one occasion, which was, I think, in February 1936, he went to Utica with a man named Wallace, that he met the Defendant Joseph
128 Falcone on the public street near a furniture store in the City of Utica. He had seen him before; he had known him, or known of him, for six years. He said he asked the Defendant Joseph Falcone if he had any alcohol and that Mr. Falcone said, "I am not in that business." He then said he asked if he know where he could get any. Mr. Falcone said he did not know where he could get any. Then he said he asked Mr. Falcone if Mr. Falcone would place a telephone call for him, if he would call up a number, and he gave him a number. He said Mr. Falcone went in the furniture store, and later a man came who sold him some alcohol. He answered me on my cross examination that at no time after his first request of Mr. Falcone for alcohol did he mention alcohol or say anything about alcohol in connection with the telephone number.

I think I have stated fully the substantial part of the evidence of Steinberg. Of course, there is no criminality in that. There is

no evidence, either, that this witness asked Mr. Falcone to procure him alcohol and that Mr. Falcone complied with his demand; merely that he called a telephone number, and there is no evidence of the conversation over the telephone.

Now, that is all there was to that.

The next time Mr. Falcone's name was mentioned was on the 1st of June when the Witness Walter F. Martin testified, and his testimony, of course, was brought out by the Government with the thought that it might show association of this defendant with other defendants, and I think I have the testimony here in my notes, and I think I have it completely:

The first time Mr. Martin said on the 20th of July 1937 at 4:37 in the afternoon Mr. Falcone went in the Venetia
129 Cafe. Now we might as well meet that right here, and as I understand the law you cannot convict a person by imagination, it must be by evidence. You cannot imagine the Venetia Cafe is this, that, or the other thing. I suppose, after hearing the name Venetia Cafe day in and week in and week out, somebody might say there must be something about that cafe. I submit there has not been one word of evidence that the Venetia Cafe is anything else but a respectable business place where some of these boys were seen at that particular time.

The COURT. Well, the picture you had last week didn't help on that.

Mr. PRIOR. There is no question about that; that he was seen in the Venetia Cafe, and a few minutes later he came out in the company of two men. Now how can you spell any criminality, or what the jury can do on that evidence as a basis of finding one guilty of conspiracy to operate stills, sell alcohol, or erect stills, or do the other things that the indictment charges, is beyond me.

The next time Martin saw him was on the 24th of July at 10:35 in the morning when he says John Melito drove to Mr. Falcone's house and went in the driveway, and Mr. Falcone opened the door. Of course I don't know what criminality there could be in that.

Then he says at 10:46 the same morning Sam Grio arrived and parked his car in front of 623 Mohawk Street, which was testified to be Mr. Falcone's residence. I do not recall any evidence that Grio was anything but a respectable citizen. There is evidence he was interested in the ownership of the Venetia Cafe, but aside from that there hasn't been one evil word said about Grio in this trial. He is named, I think, in the indictment among the
130 group that they call co-conspirators, but there is, however, no evidence that he conspired with anybody.

The next Martin said that on the 24th of August at 7:35 in the afternoon he saw Mr. Falcone driving to 1017 Ontario Street, that he went in the driveway, was there about twenty minutes

and was in conversation with Mr. Grio, and that is Mr. Grio's residence. I cannot see anything in that.

The next he says on the 15th of September he was on Bleecker Street with another investigator and saw a truckload of sugar in front of Frank Bonomo's wholesale grocery, that the sugar was being transferred from the truck to Bonomo's and the balance put in Mr. Bonomo's warehouse; that Mr. Falcone went in the grocery store, remained eight minutes, came out and stood on the sidewalk; that there was a narrow driveway, and that Mr. Falcone directed him with his hand as to how to proceed.

The next time he saw him was on the 16th of September, the next day, when he saw him driving west on Bleecker Street, and he saw him stop in front of the Venetia Cafe and Mr. Grio came out and talked with him.

The next time he saw him was on the 27th of September and then Mr. Martin was in the vicinity of 1017 Ontario Street, the home of Mr. Grio; that Mr. Falcone came there; there was another car there; another man, not a defendant, was there, and ten minutes later at 7:40 p. m. one car backed out; Mr. Falcone backed his car out, drove around the block; he said on cross examination he didn't know where he was going because he didn't follow; the witness walked around the short block and a few minutes Mr. Falcone came back, put the lights out, drove in the driveway, walked towards Martin's car; he put on his own lights and he says he beat it; he drove away.

131 Another time the witness says he saw Mr. Joseph Falcone go to the residence of John Melito at 718 Lansing Street. The jury cannot find any evidence of conspiracy there. He might meet on the street and go to the house of anybody; he might be an evil man, but that wouldn't prove that he committed the crime of conspiracy with me.

Assuming he did commit a crime, I will grant you that once the basis or foundation of conspiracy is laid, once a conspiracy is established, association with those alleged to be part of that conspiracy might be competent evidence and even proper evidence as corroboration of the other evidence of conspiracy, but to do it this way would be like building a house from the top down. Association means of itself it stands as empty in this case.

Now he saw him at John Melito's house I think some other time. Well, he saw him at other times drive west on Bleecker Street. Of course that means nothing. He saw him another time in the Venetia Cafe, and he saw two others of these defendants in there and they were talking.

Now that is the sum and substance of Martin's testimony as to his observations of the Defendant Joseph Falcone, and I say to Your Honor what could the jury do with that? What could they

find? Could they guess? Could they speculate and say, "They must have been talking about a still," because they were seen together?

What do we find next? Mr. Falcone was sugar broker or jobber. In 1937 between the 1st of March and the 14th of September he purchased, and purchased openly, making a record of it in the bank, making a record at the sugar brokers, eighty-six hundred bags of sugar.

The Government has established by the testimony of the
132 witness Bonomo in what manner he disposed of a good part of that sugar to a wholesale grocer.

Now I say they haven't connected that sugar, or any part of it, with any illegal operation. They haven't shown that an ounce of that sugar was diverted to any illegal purpose.

There is the sum and substance and the whole of the testimony as affects the Defendant Joseph Falcone.

Could a jury, if you were to submit this to the jury, find he was guilty of conspiracy? I say, on what evidence? How could they do it? Could they say, "He bought eighty-six hundred bags of sugar." Could they guess? Could they take the imagination, which seems to prevail among some of the Government witnesses, and only imagination, that some of this sugar was diverted to unlawful purposes? There is no evidence of it. There is no evidence that any sugar, any more than Damsky who bought thousands of pounds of sugar, and suppose it was found—I will go further than that,—suppose it was diverted to an unlawful purpose, and there is no evidence it was, they would have to show complicity on the part of this Defendant to the diversion of it to the unlawful purpose, and there has been no evidence.

Now I say what could the jury do? Could they speculate? No! Could they guess? No! The jury would have to put its finger on evidence and I have recited, I think in its entirety, all of the evidence wherein the name of the Defendant was mentioned.

I submit the evidence is insufficient and this defendant should not be put to a defense. The jury should not be permitted to speculate, and the indictment should be dismissed.

The Court. I think I will take all the motions and then rule on them afterwards.

133 Mr. Prior. May I then move in behalf of the Defendant Salvatore Falcone, as I now move, for a dismissal of the indictment and the discharge of the defendant on the ground that the Government has failed to prove a case; that the Government has failed to prove a prima facie case; that the Government has failed to establish the allegations set forth in the indictment.

Now here we have a situation which is in some respects similar and in other respects quite dissimilar.

Again, we sat here through four weeks of trial without hearing the name of Salvatore Falcone mentioned, except once, when the Witness Blake mentioned it, and Your Honor, of course, very properly struck out that evidence upon my motion.

Martin observed Salvatore Falcone, and it is interesting to note that this man Martin who was there for the purpose of obtaining evidence, if he could, upon any of these defendants, in all of his activities there was able to find only the events which he testified to here. I am afraid the mountain was laboring, but didn't bring forth much.

On the 3rd of June he saw Mr. Salvatore Falcone. That is the first time his name was mentioned in the evidence, and at that time he saw him on the street; on the 11th of June on Bleecker Street, near Third Street, in the City of Utica, in conversation with Lawrence Grimaldi. Of course, if the Court please, that is laughable. It is really humorous. The evidence is that Grimaldi and Salvatore Falcone are married to sisters. That is the evidence, and Martin testified that was his understanding, and for a man to meet his brother-in-law on the street and have a five minute or fifty-five minute conversation and have that held up to the world as evidence of criminality against
134 him I think it is something to laugh at, assuming it is true.

Of course Martin said he saw a man he believed to be Lawrence Grimaldi but since found out that man was Lawrence Grimaldi.

The next time Martin observed Salvatore Falcone was the 17th of October, he said on his direct examination, but on his cross examination he denied he had made any observations as to the 17th of October. He said he didn't have it in his notes, and at that time he had said at 9:55 in the morning he saw Salvatore Falcone park his car 2P–1 on the north side of the street and go into the house of John Melito, and a few minutes later this man Sam Grio, against whom not one word has been spoken, went in the house.

I think there was one other occasion when he saw Mr. Salvatore Falcone. He said on the 29th of November at 4:04 p. m. Salvatore Falcone met Sam Grio on Bleecker Street near the Ruben Sales Company and had a conversation for five minutes.

That is the beginning and that is the end of the testimony in which Mr. Salvatore Falcone's name was mentioned, except there was introduced in the evidence here a Power of Attorney from his brother to him, and from him to his brother, for their convenience in conducting their bank accounts, and I think a check, or perhaps two, in payment for sugar sold to Mr. Joseph

Falcone was signed under the Power of Attorney by Mr. Salvatore Falcone.

Of course it would be ridiculous, I say, to ask a jury to make any finding of fact against this Defendant on that evidence. There is nothing to establish conspiracy and there is nothing to establish wrong, and I submit in that case the motion should be granted and the indictment dismissed and the Defendant discharged.

135 THURSDAY AFTERNOON, JUNE 8, 1939.

Mr. DANELLA. May it please the Court: I move to dismiss the indictment as against the Defendant Henry Alberico on the ground that he has not been connected with any conspiracy, and for lack of proof showing guilt of conspiracy.

In the indictment are two counts charging this Defendant—Count 24, which, in substance, charges that Alberico and Funicello sold large quantities of sugar to the said defendants for use in operating illegal and unregistered distilleries and knowing at the time he sold the sugar it was to be used for such illicit purposes.

And Count 25 charges the defendant with selling large quantities of tin cans, knowing that such tin cans were to be used in operation and maintenance of such illegal stills.

The evidence in this case, as I get it from recollection and notes I have made shows that the firm of Alberico and Funicello have been in the wholesale grocery business for a period of over twenty years; that during the period of conspiracy which the Government contends in the indictment from March 19, 1933, until October 19, 1938, the evidence is bare of either the purchase or sale of any sugar of any kind by this defendant during the years 1933 up to and including 1936.

In regard to the purchase of the sugar by the partnership in this case, of which Henry Alberica is a member, the Government shows that purchases of sugar were made from September 27, 1937, to June 1st, 1938, through Mr. Brucker, a broker, and that at that time he bought four thousand, two hundred ninety bags
of sugar, and he made a further purchase of three hundred
136 ten bags from the Sucrest Corporation, making a total of forty-six hundred bags of sugar.

The evidence shows he purchased sugar from E. Damsky from January 1937 to October 1938; and also purchased a certain amount of sugar from Frank Bonomo & Son.

The evidence in regards to the cans showed that he purchased cans from David Rosen, sales manager of the Atlas Can Company, and in 1936 Mr. Rosen called at the place of business of

this firm and started to sell cans at that time, continuing until August 1938.

There is nothing in the record as to the disposition and sale of any of this sugar or cans by the Defendant Alberico except in one instance. That was the testimony of George Blake, which is entirely uncorroborated, and Mr. Blake being a defendant and co-conspirator in this case, has already pleaded guilty. His testimony showed that using a pick-up truck owned by Morreale on eight or ten occasions he went to the place of business of his firm; that on the first occasion when he went to this place of business from fifteen to twenty bags of sugar and four cases of cans were loaded on this truck, and only on one occasion did Blake see the Defendant Henry Alberico and he said at that time this Defendant had a conversation with Morreale.

The Government will claim that that conversation between Morreale and Alberico will show the guilty knowledge of this defendant. That conversation in short was Morreale asked the Defendant Alberico why he didn't trust him that day for whatever purchase he had made, and Alberico replied that his business was too risky and he couldn't trust him.

Now it is our contention that even if this evidence is
137 true that it is insufficient to connect the Defendant Alberico in any way with any conspiracy with any of the co-defendants.

As to the tin cans I only want to say there is no law which prohibits the sale of five-gallon tin cans.

The COURT. You needn't discuss that. There is no law which prohibits buying and selling sugar or tin cans. The question here is whether they were used for lawful purposes after they were purchased.

Mr. DANELLA. There is no evidence except the conversation between Alberico and Morreale which shows any knowledge on the part of this defendant for what purpose the cans and sugar was to be used. The evidence also shows in that regard that Morreale and his mother ran the grocery store in the City of Utica. Mr. Blake brought that out himself when he said he made several purchases of groceries at that store.

Now there is more than one inference that can be drawn from that conversation. There is the innocent inference and the guilty inference. If more than one inference can be drawn it is the duty of the jury to draw the innocent inference.

There is no evidence to show that the defendant conspired to operate any illegal still and to defraud the Government of any revenue in the manufacture of any alcohol.

It might be admitted for the sake of argument that the Government has proved many small stills in this case and not one large conspiracy, as charged in the indictment. In this regard I wish to call the Court's attention to Mercante v. United States, 49 Federal, 2nd, page 156.

Mr. JOSELIT. What is that citation?

Mr. DANELLA. 49 Federal 2nd, 156.

Mr. JOSELIT. What is the name of the case?

138 Mr. DANELLA. Mercante. In which the Court said, although there was evidence certain defendants in this case were guilty of conspiracy, that certain other defendants had violated the liquor law, there was no evidence either group of defendants in whom any conspiracy existed had any part in carrying out the purposes of the comprehensive conspiracy charge.

I say that no conspiracy has been proved in this case; there have been numerous small stills proven, and that that is all, and the indictment is fatal.

There is no evidence in this case to show that the Defendant Alberico had any reason to believe that the merchandise which he sold, if he did sell any merchandise to the defendant Morreale, was going into any illicit distillery. There is no evidence in this case to show he ever associated with any of the other defendants in this case, and there is no evidence to show he ever visited the Venetia Cafe. There is no evidence to show he was seen with any of these defendants; or any delivery of sugar or tin cans by this defendant in his own truck to any distillery or illegal places where alcohol is made.

The evidence is bare as to the proof made by the sale of five-gallon tin cans. The record does show from the testimony of Mr. Bonomo the profit made on one hundred pounds of sugar is from ten to fifteen cents. There is no evidence at any place that other than the regular wholesale price was ever charged by this defendant. The evidence also shows that several other wholesale grocers in the City of Utica bought each and every brand of sugar which has been mentioned in this trial, and that the same was disposed of by them in the usual course of business. It is

139 noticeable in this case that no other dealer or no other wholesale grocer in the City of Utica who are selling the same brands of sugar as that sold by this defendant, or his firm, were mentioned in this indictment, and yet the same proof would be available against them as to the quantity of sugar bought by them and sold by them.

The Government will probably contend that the unusually large amount of sugar was purchased in the year 1937 by this firm, and the evidence shows in that regard that all jobbers and wholesalers

were notified of a tax of one dollar per hundred pound bag of sugar, and all the trade was buying heavily at that time.

I therefore ask the Court that the motion to dismiss the indictment against the Defendant Henry Alberico should be granted.

THURSDAY AFTERNOON, JUNE 8, 1939.

The Court: * * *

And the motions as against the other defendants are denied, and each may have an exception. The bonds on file by the nine defendants I have just named I order exonerated, and the denfendants may be excused from further attendance at this court if they care to go.

Mr. PRIOR. May I have an exception on the record?

The COURT. Each of the defendants whose motions have been denied may have an exception. (Conference at the Bench between the Court, and Mr. Prior, Mr. Byrne, and Mr. Baldwin.)

(Recess taken for ten minutes. Case resumed after recess, same date and place.)

The COURT. Ladies and Gentlemen of the Jury: Once again I am going to call your attention in particular to the admoni-
140 tions I have heretofore given you and request that you follow the same. You may be excused until tomorrow morning at ten o'clock.

(The jury was thereupon excused at 2:35 p. m.)

The COURT. Mr. Baldwin, I will hear your motions if you are ready to make them.

Mr. BALDWIN. If the Court please: I desire at this time to make a motion to strike from the indictment certain testimony.

Mr. PRIOR. May it be understood any motions and exceptions will inure to all defendants so we won't have to repeat?

The COURT. Yes.

Mr. BALDWIN. I have been requested to wait for Mr. Joselit.

If the Court please: I desire to move to strike from the testimony all of the evidence, together with the exhibits, of the still at 726 Catherine Street. The seizure was on the 27th day of October 1934.

Your Honor will recall that this property at that time was owned by the First Citizens Trust Company of the City of Utica, and a lease was put in evidence showing that the premises were leased to one Paul Maciol. There is none of the defendants connected in any way with this still.

The COURT. The motion is denied. You may have an exception.

Mr. BALDWIN. If the Court please: I move to strike from the evidence——

The COURT (interrupting). Let me ask you: As I recall, those were the premises where a still was found in September 1937?

Mr. BALDWIN. Later; yes, Your Honor.

141 The COURT. The motion is denied. You may have an exception.

Mr. BALDWIN. I also move to strike from the evidence the testimony in regard to the still at 3 Lamott Place, which was seized on the 18th day of November 1935.

Now Your Honor will recall that in that case there were three of the so-called co-conspirators, but not indicted, namely: Drost, Anello, and Cannizarro, all of whom took the stand and none of whom, or any other witness, testified that any of the defendants were connected in any way with this still.

The COURT. The motion is denied.

Mr. BALDWIN. May I have an exception.

I further move to strike from the evidence, Your Honor, all of the testimony in regards to the still at 510 Milgate Street, Utica, New York, on the 5th day of October 1934.

Now perhaps in that connection Your Honor will recall that no one was at that still. The lease, apparently, was in a fictitious name. The owner was sworn. No defendant was ever caught there and it stands all by itself unconnected in any way.

The COURT. The motion is denied.

Mr. BALDWIN. May I have an exception.

I make a similar motion to strike all the testimony and exhibits in regards to the still found at 310 Pitcher Street.

In this Your Honor will also probably recall no defendant whatever was apprehended there and no witnesses have taken the stand, and there is no testimony in this case that this still was in any way connected with this conspiracy, or any other conspiracy, or with any of these defendants.

The COURT. Motion denied.

Mr. BALDWIN. May I have an exception.

142 If the Court please: I move to strike from the evidence, from the record, all of the evidence in regard to the second still found at 726 Catherine Street. That is the still which was found in these premises when it was owned by Dominick Luvera.

There were no defendants there at the time. There was no evidence that any of these defendants ever operated it, or any evidence anyone was ever connected with it.

The COURT. Motion denied.

Mr. BALDWIN. May I have an exception.

If the Court please: I move to strike from the record all the evidence of a still, or of any evidence at 400 Railroad Street. These are the premises Your Honor will recall where Fabrizio and Labella were, so they claimed, getting——

The COURT (interrupting). That was down at Frankfort?

Mr. BALDWIN. That is right Your Honor. And all of those defendants have, I believe, been dismissed from this indictment. There was no still there and no evidence of any crime being committed.

The COURT. Motion denied.

Mr. BALDWIN. May I have an exception.

Now if the Court please, I move further to strike from the record all the evidence of the still at 1719 Pierrepont Avenue which the agents testified they raided on the 28th day of April 1937.

Now no one was found there at that still. There is no evidence in this case to show any of these defendants were in any way ever connected with it, or that it is any part of any conspiracy.

The COURT. Motion denied.

143 Mr. BALDWIN. May I have an exception?

And I move further, if the Court please, to strike out from the record all of the testimony in regards to a still being found on the premises of the Jones Farm, so-called, in the Town of Remsen, New York, which is covered by the ninth overt act in the indictment.

The ninth overt act charges that on the 14th day of July, 1937 the Defendant Ralph Lasando, the name being fictitious, operated a still at those premises.

I call the attention of the Court that there is absolutely no evidence to connect this still with any conspiracy or with any defendant in this case, and that no one was found on the premises.

The COURT. Motion denied.

Mr. BALDWIN. May I have an exception?

I further move, Your Honor, to strike all the testimony from the record in regards to the still found at 910 Morris Street.

Your Honor will recall that in this case one Peter Sabino was found at those still premises; that he had plead guilty, and that there is absol .ely no connection with this still or with any of the defendants now remaining on trial, or there is no evidence to connect this still at 910 Morris Street with any conspiracy.

The COURT. Motion denied.

Mr. BALDWIN. Now, if the Court please, I move to strike out the testimony of the Witness Martin, all of the testimony in regards to yeast found in the keg of the Shortex Products Company. I can give Your Honor a little more specific information on that.

Now in regards to that, Your Honor, the Witness Martin
144 found this empty keg at the Bortiatynski Farm, however you pronounce it. He testified that this name, "Shortex Products Company" was on the yeast keg, and they introduced one yeast keg in evidence.

I submit there is absolutely no evidence to connect any defendant with that type of yeast keg.

The COURT. Motion denied.

Mr. BALDWIN. May I have an exception?

Now, if the Court please, I further move to dismiss the indictment on the grounds that the proof in this case is at such a material variance with the allegations contained in the indictment that it is prejudicial to all the defendants remaining on trial at this time to send this case to the jury. And in that connection may I call Your Honor's attention to the fact that the indictment charges that the conspiracy commenced on the 1st day of March 1933; that there is absolutely no evidence in this case to show that during the year 1933 that any conspiracy was formed or that any of the defendants had in any way committed an overt act.

I believe first the evidence introduced in this case was in regards to the operation of a still at 726 Catherine Street in April of 1934. I think that is the first testimony of any date introduced in this case.

I further call Your Honor's attention to the fact that the indictment charges that overt acts were committed in the County of Clinton, County of Albany, County of Oswego, and the County of Jefferson, as well as the County of Onondaga, Oneida, and Herkimer.

I call Your Honor's attention to, at least as far as I have been able to find, there has been absolutely no testimony of an overt act, or any of the conspirators, or that anything occurred in those four counties I mentioned in the first instance.

I also call Your Honor's attention that the indictment charges that this conspiracy, together with the defendants still on trial here, committed certain acts in Chester, Pennsylvania. I know of no evidence in this case that connects anything with that town or village or city.

I also call Your Honor's attention to the fact that the indictment charges that certain acts were committed in Massachusetts. I have heard no evidence in this case——

The COURT (interrupting). In other words, is it your contention that an indictment is bad unless the Government successfully sustains every alleged overt act?

Mr. BALDWIN. I do not, Your Honor. But I do contend and the basis of my contention is that if the Government seeks to draw a shotgun indictment,—if I may use that term—and allege in great detail specific places and a multitude of places and then proves nothing, that that indictment is so at variance with the proof that then it is prejudicial to ask that any defendants still on trial under that indictment should proceed to the jury.

Now I do not claim, Your Honor, that in every instance that everything in detail that the Government might allege in a con-

spiracy indictment, that it is their duty to prove, but I do claim that they must keep their proof so within that indictment, and I claim that is not so in this case.

And I also, Your Honor, move to dismiss the indictment on the ground that if any conspiracies have been proven that the conspiracies are not one big conspiracy, but a series of small conspiracies, wherein separate and distinct parties have been found with some connection therewith, and that it is fatal and defective.

146 The COURT. That is for the jury, is it not?

Mr. BALDWIN. I believe, Your Honor, that it is a question of law rather than a question of fact.

The COURT. I will deny your motion.

Mr. BALDWIN. May I have an exception?

Mr. PRIOR. I move in behalf of the defendants whom I represent to strike from the record evidence on the part of the Government on the purchase of sugar by the Defendant Joseph Falcone, which evidence I understood was received subject to connection.

I make that motion now on the ground there has been no connection shown between any purchase of sugar by the Defendant Joseph Falcone and any act charged in the indictment, or pertinent to the allegations of the indictment.

The COURT. Motion is denied.

Mr. PRIOR. Exception.

Mr. DANELLA. I move to strike from the record the following testimony on the ground it hasn't been connected up with any defendant and is therefore prejudicial to the Defendant Henry Alberico if it remains in the record.

First, the testimony wherein it is stated that two hundred forty-five five-gallon tin cans were found at a still 726 Catherine Street on October 27, 1934.

The COURT. The motion is denied.

Mr. DANELLA. Second; the testimony with regard to finding twenty-two bags of Hershey sugar in a still at 3 Lamott Place.

The COURT. Denied.

Mr. DANELLA. May I take my exceptions at the end?

The COURT. All right.

Mr. DANELLA. The testimony in regard to the finding of twenty-eight bags of granulated sugar, Sucrest and Na-
147 tional brands at the Baldwin Milk Station on March 9, 1937.

The COURT. Motion denied.

Mr. DANELLA. Testimony with regard to finding fourteen bags of Pearl White and Starlight sugar at 1934 Beechgrove Place April 10, 1937.

The COURT. Motion denied.

Mr. DANELLA. With regard to finding fifty-nine bags of sugar labeled Matess Estate, Cuba, on Pitcher Street, April 14, 1937.

The COURT. Motion denied.

Mr. DANELLA. Testimony in regard to finding the thirty-six empty five-gallon cans; fifty paper-board cartons; and the two hundred sugar bags at 726 Catherine Street, September 30, 1937.

The COURT. Motion denied.

Mr. DANELLA. Testimony in regard to finding of seventy-seven Sucrest sugar bags and the admission into evidence of Exhibit 194, which was the Sucrest sugar bag with certain identification marks which were found at 726 Catherine Street, on the ground that that exhibit was not connected with any of the defendants and is therefore prejudicial to Mr. Alberico.

The COURT. Motion denied.

Mr. DANELLA. Strike from the record Exhibit 208 the Sucrest sugar bag found at 400 Railroad Street, Frankfort, November 5th, 1937.

The COURT. Motion denied.

Mr. DANELLA. The testimony in regard to nineteen empty five-gallon cans; sixty empty card-board cartons, and Exhibit 211 to 216, which were twenty-five empty Starlight sugar bags, and twenty-five empty Hershey sugar bags, found at 1719 Pierrepont Street April 28th, 1937.

The COURT. Motion denied.

148 Mr. DANELLA. The testimony in regard to the finding of twenty-eight empty five-gallon cans; four bags of sugar, at the Kelley Farm on August 24th, 1937.

The COURT. Motion denied.

Mr. DANELLA. Strike from the record the exhibit 263, which was the National sugar bag; exhibits 264 and 267, which were Sucrest sugar paper bags,—not connected with any defendant.

The COURT. Motion denied.

Mr. DANELLA. The testimony with regard to fifteen bags of Sucrest sugar; fifty-three empty Sucrest sugar bags, found January 17th, 1938 at 910 Morris Street, Utica.

The COURT. Motion denied.

Mr. DANELLA. Testimony with regard to the finding of fifty empty sugar bags; one hundred seventy empty five-gallon cans, January 10th, 1938 at the Bortiatynski Farm.

The COURT. Motion denied.

Mr. DANELLA. Testimony in regard to the finding of ninety-two sugar bags, Exhibit 291 which was six Sucrest sugar bags, received in evidence, January 21st, 1938 at 1166 Webster Avenue.

The COURT. Motion denied.

Mr. DANELLA. Testimony in regard to finding five empty Sucrest sugar bags at South Charles Street, Rome, August 6th, 1938.

The COURT. Motion denied.

Mr. DANELLA. The testimony in regard to Exhibit 333 which the top of a five-gallon can found July 21, 1938 at 3 Sanquoit Street, Whitesboro; and the finding of fifty empty five-gallon cans at the same place; and one hundred forty Sucrest sugar bags.

The COURT. Motion denied.

149 Mr. DANELLA. Testimony in regard to the finding of twenty-three bags of H. & E. sugar; three Sucrest bags, and thirty-six five-gallon cans, at the Frances Road, New Hartford, October 4, 1938.

The COURT. Motion denied.

Mr. DANELLA. I move to strike from the record Exhibit 425, the signature card of the firm of Alberico & Funicello.

The COURT. Denied.

Mr. DANELLA. Exhibit 426, the Recordak of the check dated April 24, 1937, payable to Joseph Falcone, made by Alberico & Funicello.

The COURT. Denied.

Mr. DANELLA. And signed by Henry Alberico.

Exhibit 427, another check.

Mr. JOSELIT. What was the last?

Mr. DANELLA. 427.

Mr. JOSELIT. Is that a Recordak?

Mr. DANELLA. A check.

Strike from the record Exhibit 440, which was the invoice of cans sold to Alberico & Funicello by the Atlas Can Company; and also Exhibits 441 and 441-a–441-e, duplicate copies of invoices of the sale of cans.

The COURT. Denied.

Mr. DANELLA. Exhibit 445, daily records of sales of sugar to Alberico & Funicello by Turner Brothers.

The COURT. Denied.

Mr. DANELLA. Exhibits 451, 452, and 453, also invoices of the sale of sugar.

The COURT. Denied.

Mr. DANELLA. Exhibits 466, 467, invoices of the sale of sugar from Joseph Damsky to the defendant Alberico; and

150 Exhibit 470, invoice of sale of sugar by Bonomo to the same defendant.

The COURT. Motion denied.

Mr. DANELLA. May I have an exception to each of the denials?

The COURT. Yes.

Mr. PRIOR. May we all be recorded as joining in with the motions of Mr. Danella and each have the benefit of an exception?

The COURT. Yes; you may have.

The COURT. Are there any other motions?

Court will stand in recess until tomorrow morning at ten o'clock.

The Clerk of the Court. Court will be in recess until tommorrow morning at ten o'clock.

Adjournment taken at 3:10 p. m. until Friday, June 9th, 1939, at 10:0 a. m.

Mr. BYRNE. If the Court please: As against the Defendant John Nole, for whom I appear, I call Your Honor's attention to the evidence which shows that during the time of the alleged conspiracy, or most of the time, the Defendant John Nole was employed as a salesman, or manager of the Utica branch of the National Grain & Yeast Company on a salary and handling yeast in and about the city of Utica; that he was working strictly upon a salary. There isn't an iota of evidence in the case that he ever purchased yeast, or handled yeast from any other source except from his employer. It is said that labels from his employer's products were found in some of the seized stills. It also appears by the evidence of Mr. Farrell that daily reports were made by Mr. Nole to his employers and that similar reports were made to
151 the Government of each and every sale of over five pounds, and that shipments were made as against the sales reported on the slips, and I believe it was testified that in a consumer sheet of sales, as recorded by Mr. Nole, it showed that he knew personally each and every purchaser with the exception of three, and he explained that he did not know the owners of the chain stores and bakeries and these were apparently chain-store bakeries.

Now in addition to that there is the evidence of Mr. Blake, which is entirely uncorroborated, that on a Sunday morning John Nole came to Mr. Morreale, or was sought out by Mr. Morreale who was conducting a still at 29 Whitesboro Street, and that he went into a store and told the woman it was all right, and she gave Morreale a carton of what Mr. Blake stated to be yeast. There was no description of the type or kind of yeast, nor no corroboration of the finding of this yeast upon the premises, or no yeast was identified as the same yeast, and that isolated uncorroborated statement by a co-conspirator and one who has pleaded guilty to the charge is the only evidence, outside of the evidence that John Nole associated with Nicky Nole and that he lived about a block and a half from that portion of Bleecker Street upon which the Venetia Cafe was located.

We feel that the evidence there of only one isolated transaction of the sale of the yeast to any person identified or connected with

a still is no evidence of any knowledge on the part of Nole at that time that Morreale was conducting a still, and I believe the evidence shows Morreale had a grocery store, or his father did, and I do not believe that to be sufficient evidence to in any way connect or associate John Nole with the general conspiracy
152 commencing in 1934 and ending in October 1938, and I feel he is entitled to a dismissal. I do not feel that the evidence associating him with his brother in the companionship of his brother or at 1500 Broad Street, which was the warehouse also of the National Grain and Yeast Company, in any way connects or associates him with this charge of conspiracy sufficient to let the jury speculate upon his innocence or guilt.

Witnesses on behalf of defendants

WITNESS SWORN IN BEHALF OF DEFENDANT SALVATORE FALCONE.

Horace A. Battaglia testified that he is a duly licensed dentist practicing in the City of Buffalo, New York; that he has been a practicing dentist for eighteen (18) years; that he has known the defendant Salvatore Falcone since April 4, 1930, having on that day first treated him as a patient in his office at Buffalo; that at various times since that day he has treated professionally defendant Salvatore Falcone at his office in Buffalo. On November 27, 1937, at Buffalo, he treated Salvatore Falcone and made an appointment to treat him in the evening of November 29, 1937, between 7:00 and 7:30. At that time he extracted a tooth. The witness made a record of his treatment of Salvatore Falcone. It was identified and received in evidence as Defendant's Salvatore Falcone's Exhibit "HH." The record was begun on April 4, 1930, and from time to time thereafter were entered into the record items of treatment of the patient. The witness also kept appointment books for his patients. They were received in evidence as Salvatore Falcone's Exhibit "OO," "PP," "QQ," and "RR."
153 In Exhibit "OO" was a notation of an appointment for Mr. Falcone on Saturday, November 27, 1937, and also a notation indicating that Salvatore Falcone was treated by the witness in Buffalo on November 29, 1937, between 7 and 8 o'clock. The witness produced a laboratory report of an examination of the sample of an urine examination of Salvatore Falcone dated November 27, 1937. It was received in evidence as Salvatore Falcone's Exhibit "SS."

WITNESSES SWORN IN BEHALF OF DEFENDANT JOSEPH FALCONE

Nicholas Ulisse testified that he is one of the proprietors of a general 5 & 10¢ store in the City of Utica, New York; that he has been a resident of Utica for forty-nine (49) years. He has known

Joseph Falcone for upwards of fifteen (15) years. On August 21, 1937, the witness was on vacation at Atlantic City, New Jersey, and stayed at a small hotel or boarding house known as Villa Russo, 9700 Pacific Street. With him was his sister, Mrs. Angelina Vitulo. The witness went to Atlantic City on July 6, 1937. Joseph Falcone arrived at Atlantic City on August 21, 1937, and remained there a week or a little longer than a week. He was there each day. The witness and he played cards each day. Mr. Falcone's wife and family were there. He fixes the date August 21, 1937, because on August 20th he had received a telephone call from Utica in connection with his business and his partner, Florio Vitulo, who had been with him at Atlantic City, left to attend to the business in Utica.

Angelina Vitulo testified that she lived in the City of Utica
154 for many years. She was a sister of Mr. Ulisse, the preceding witness. She was outside of the courtroom when he testified, and she did not hear him testify. She knows Joseph Falcone for about fifteen (15) years. She knows his wife and family. She went to Atlantic City with her brother, Mr. Ulisse, on July 6, 1937. They remained at Atlantic City until September 18th. Joseph Falcone came to Atlantic City on August 21st. He remained there a week. She saw him each day. They had meals at the same table. She identified a photograph of a group of people taken at Atlantic City during the week following August 21, 1937. The persons in the picture are Mrs. Joseph Falcone, Mrs. Anthony Falcone, Miss Josephine Falcone, who is Joseph Falcone's daughter, the witness, a resident of Utica named Josephine Lamonta, and Joseph Falcone, holding in his arms his son Anthony. There was also in the picture his nephews, Joseph Falcone and Anthony Falcone. She fixes the time because she had in her possession a letter written to her husband at that time. In the letter she mentions that Joseph Falcone was at Atlantic City. It was a special-delivery letter sent by her on August 27, 1937, in which she mentioned that Joseph Falcone was in Atlantic City. The letter was received in evidence as Defendant Joseph Falcone's Exhibit "JJ."

Lucia Russo testified that she resides in Atlantic City, New Jersey, and has lived there since 1927. She and her mother operate a rooming house in Atlantic City called the Villa Russo. Her work in the business is varied. She serves at table, washes dishes, does general housekeeping, and kee; s the records. They have ten (10) bedrooms in the house. The business is open in the summertime. Mr. Joseph Falcone and his wife and family have been
155 patrons at her boarding house. Mr. Nicholas Ulisse and his sister, Mrs. Vitulo have been patrons. The witness produced a book in which were records kept in the regular

course of business of the boarding house. It was received in evidence as Defendant Joseph Falcone's Exhibit "MM." On Page 53 of Exhibit "MM" is a note of arrival on August 3rd, 1937, of Mrs. Joseph Falcone and Mary, Anthony, and Josephine, of 1623 Mohawk Street, Utica, New York. There is a notation that they departed on August 6th. There is a notation indicating that Mrs. Joseph Falcone and her children, Josephine, Anthony, and Mary arrived at the Villa Russo on August 15th. There is a notation under date of August 21, 1937, that Mr. Joseph Falcone came on that date. The book records that they all left on August 30, 1937.

Palma J. Mercurio, testified that she resided with her husband in the City of Utica, New York. She has been employed by Salvatore Falcone and Joseph Falcone for seven (7) years. Their businesses during these years were Wholesale Grocery, under name of "S. Falcone & Bro.," a partnership dissolved in 1936, Hide and skin business under the name "Valley Hide & Skin Company," a partnership of Salvatore and Joseph Falcone, broom manufacturing business at Utica under the name of "Peerless Broom Brush Mills." This business was owned by Salvatore Falcone. Cheese manufacturing business under the name "Falcone Cheese Company," Utica, New York. This business was owned by Salvatore Falcone who later gave it to his son, Victor Falcone. Beer distributing business after repeal in 1933–1934 and this was a partnership of Salvatore and Joseph Falcone under the name of "S. Falcone & Bro."

156 Cross examination by Mr. JOSELIT:

Q. Were they in the beer business?—A. Yes, sir.

Q. And were they in the beer business as partners?—A. Yes.

Q. Both Salvatore and Joseph were partners?—A. Yes, sir.

Q. Now the firm of S. Falcone & Brother consists of whom?—A. Salvatore Falcone and Joseph Falcone.

Q. And they are partners in that business?—A. They were at the time the business was in operation.

Q. And that was a wholesale grocery business back in the early 30's, is that right?—A. Yes, sir.

Q. Now, do you have any records of any transactions of either of these partners, Salvatore and Joseph Falcone, whereby sugar was bought during 1935, 1936, or 1938?—A. No, sir.

Q. During your several years of employment as bookkeeper, stenographer, and secretary for the Falcone Brothers, have you any recollection of any transactions in sugar outside of the year 1937?—A. No, sir.

The COURT. Let me see those, please. How long ago did Falcone and Brothers get out of the wholesale grocery business?

The WITNESS. About 1936 I would say, or in or around there.

The COURT. That is, they have not been in the business in the wholesale grocery business?

The WITNESS. That is right.

The COURT. Since 1936?

157 The WITNESS. Not S. Falcone and Brother, no.

Redirect examination by Mr. PRIOR:

Q. Well, Mrs. Mercurio, is your recollection good?—A. I would say.

Q. I mean as to when Mr. Joseph Falcone went to Arkansas?—A. I don't know exactly the date.

Q. Not exactly, but approximately the time.—A. It was——

Q. (Interrupting) The year, or approximately the month?—A. The year was 1937, the month was March.

Q. And he was away how long?—A. Three or four weeks.

The witness identified invoices showing sales of sugar by Joseph Falcone to wholesale grocers in the City of Utica amounting to 8599 bags of one hundred pounds each. These invoices were received in evidence and marked Defendant Joseph Falcone's Exhibit "UU," "UU-1," and "UU-2."

"UU" are delivery receipts signed by the customer, Frank Bonomo & Co., amounting to 5707 bags of sugar of one hundred pounds each, delivered in various lots at various times.

Exhibit "UU-1" are sales invoices received by the customer showing sales of sugar to Alberico & Funicello amounting to 800 bags of one hundred pounds each, of various amounts and delivery dates.

Exhibit "UU-2" are invoices received by the customer showing sales of sugar to Pauline Aiello in the amount of 2092

158 bags of one hundred pounds each, delivered in various lots at various times. The witness identified ledger sheets of account of Joseph Falcone made in her own handwriting in the regular course of business, showing sales by Joseph Falcone to Pauline Aiello and Alberico & Funicello. These were received in evidence as Defendant Joseph Falcone's Exhibit "VV" and "WW."

Exhibit "VV" is Joseph Falcone's ledger sheet of the account of Pauline Aiello, Wholesale Grocer. It shows cash sales except one sale at various dates between March 10 to May 4, 1937, inclusive of 2092 bags of sugar at $5.00 a bag amounting to $10,460.00. It shows that the account was paid.

Exhibit "WW" shows the sale to Alberico & Funicello, Wholesale Grocers, between April 1st, and April 30, 1937, of 800 bags of sugar at $5.00 per bag, amounting to $4000.00. It also shows the account was paid.

Clifford Brophy, testified that he was Branch Manager of the Peoples Office of the First Citizens Trust Company of Utica.

He has been employed by that bank or one of its affiliated units since 1912. He knows the defendant, Lawrence Grimaldi, and he knows the defendant Joseph Falcone. He testified that Grimaldi came to the bank and requested a loan of $80.00; that he told Grimaldi if he could get an acceptable indorser he would take care of him, and that later Grimaldi offered the indorsement of Joseph Falcone. The loan was made and part of it is still on the books in the amount of $30.00. The note has been partly paid in installments and renewed. It was protested on March 30, 1939, and a renewal was protested on May 31, 1939.

159 Anthony Greco, testified that he resides in Utica and has been in the trucking business for about ten (10) years; that he operates under the name of "Greco Brothers" and under the name of "A. J. Motor Company." He has been using these names seven or eight years. It is a partnership. The office is at 1308 Lansing Street, Utica. The partners are the witness, his brother George, and his brother Joseph. In 1937 they bought a truck from Joseph Falcone, who had been in the wholesale grocery business. The witness hauled sugar for Joseph Falcone from March through the middle of September 1937 from New York to three different wholesale grocers in Utica—Bonomo and Company, Aiello & Company, and Alberico & Funicello. He was paid by check of Joseph Falcone. He identified statements of his charges rendered by him to Joseph Falcone. These statements were received in evidence as Joseph Falcone's Exhibits "NN," "NN–1," "NN–2," "NN–3," "NN–4." The Exhibits contained an account of all the sugar the witness transported for Mr. Falcone. He did not deliver any of it to any other place at all except the three (3) wholesale grocers he had mentioned—Bonomo & Company, Alberico & Funicello, and Aiello & Company. During the transporting of the sugar one bag was lost by him and he paid Mr. Falcone for it. The witness during the time that he delivered for Joseph Falcone, delivered sugar for various sugar jobbers in the City of Utica, including "Field & Start," "Griffin & Hoxey," and "E. S. Damsky." The witness delivered from the New York dock and warehouse for the account of Joseph Falcone to the three (3) wholesale grocers 8600 bags less the one that was short.

160 He testified that Government's Exhibit 462, received in evidence during the examination of his brother, Joseph Greco, was not a true record of their business or made in the regular course of business. It was made or built up during a period of about two weeks from freight bills that they were able to find from a box kept in their office. Many of the bills they could not find. The purpose of the book was to show the general nature of their business for the purpose of obtaining a permit from the Public Service Commission.

WITNESSES IN BEHALF OF DEFENDANT HENRY ALBERICO.

Fred J. Bener, testified that he is the Office Manager of the Pillsbury Flour Mills Company, and that he has known Henry Alberico and has done business with the firm of Alberico & Funicello for the past fifteen (15) years. That over the past fifteen years he has sold to the firm of Alberico & Funicello an average of from 3,500 barrels to 4,500 barrels of flour per year, barrels of two hundred pounds each. That the witness has, on several occasions, been to the place of business of Alberico & Funicello, and that he knows the firm sells other kinds of flour. That he knows the reputation of Henry Alberico as being a law-abiding citizen and that it is good.

George B. Moore, testified that he resides in the City of Syracuse, and is District Representative of Wesson's Oils from the sales corporation. That he knows Henry Alberico and that he has conducted business with the firm of Alberico & Funicello over a period of the past eighteen (18) years. That the witness has sold the firm of Alberico & Funicello salad oil, Italian case oil.

161 By Mr. DANELLA:

Q. Can you tell us approximately, Mr. Moore, on an average how much oil you have sold him within the last eighteen years?

Mr. JOSELIT. That is objected to as immaterial.

The COURT. Sustained.

Q. Can you tell us how much oil you sold Mr. Alberico in the year 1937?

Mr. JOSELIT. That is objected to as immaterial.

The COURT. Sustained.

Mr. DANELLA. Exception.

The witness further testified that the reputation of Henry Alberico as a law-abiding citizen was good.

Joseph Traverasa, testified that he resides in the City of Utica and was a traveling salesman employed by the firm of Alberico & Funicello for the past eight (8) years. That he covers a particular territory each week, going north one week to Booneville, Carthage, Watertown, Malone, Massena, and Ogdensburg, in the east, Schenectady, Albany, Saratoga, Glenns Falls, Amsterdam, Troy, Watervliet, and Waterford; in the west, Geneva, Syracuse, Auburn, Binghamton, and Seneca Falls. That in his territory he calls on approximately 500 customers. That the firm of Alberico & Funicello employ three (3) other traveling salesmen, and that the firm has, in all, approximately 1,500 customers besides the customers located in the City of Utica.

162 By Mr. DANELLA:

Q. Now in the course of your sales to your customers do you sell sugar?—A. Sure.

Q. In one-hundred-pound bags?—A. In one-hundred-pound bags, yes, sir.

Q. In 1937 are you able to state what the average sales of sugar per month were by you?

Mr. JOSELIT. That question is objected to as incompetent, irrelevant, and immaterial, not the proper method of proof.

The COURT. I think I will sustain. He has got records to show that.

By Mr. DANELLA:

Q. What do you do with your records as you make a sale, Mr. Traverasa?—A. I give it to the office.

Q. Every week do you turn in your records to the office as to the orders you receive for that week?—A. Sure.

Q. They fill the orders and send them to the customers?—A. And send them to the customers.

Q. And they keep your records. Are you able to state approximately from your memory how many bags of sugar you sold in the year 1937?

Mr. JOSELIT. That is objected to on the ground that the records are the best evidence and they are within the possession of this Defendant.

The COURT. Sustained.

Mr. DANELLA. Exception.

By Mr. DANELLA:

163 Q. Mr. Traverasa, do you sell five gallon tin cans?—A. I do.

Q. To your customers?—A. Sure.

Q. And most of your customers are Italian grocery stores?—A. Most of them.

Q. Are you able to state whether many of those customers buy olive oil in bulk?—A. On all my territory about twenty or twenty-five.

Mr. JOSELIT. If the Court please. That is objected to.

The COURT. Sustained.

The COURT. You say that most of your customers are Italian grocers?

The WITNESS. Yes, sir.

The COURT. How big a proportion are Italian grocers?

The WITNESS. About seventy-five or eighty per cent are Italian.

By Mr. DANELLA:

Q. You say about seventy-five or eighty percent of your customers are Italian grocers who run grocery stores?—A. Yes.

The COURT. I understand you do not travel in Utica at all?

The WITNESS. No.

The COURT. You have the rural sections?

The WITNESS. That is right.

By Mr. DANELLA. Do you know, Mr. Traverasa, for what purpose these five gallon tin cans were sold or are used for?

164 Mr. JOSELIT. That is objected to on the ground it is immaterial and not within the issues of this case.

The COURT. Sustained.

Mr. DANELLA. Exception. That is all.

Redirect examination by Mr. DANELLA:

Q. And about how many items of groceries do you sell?—A. Four hundred and twenty-five, about that.

Q. No, I mean how many besides sugar and cans, what else do you sell?

Mr. JOSELIT. That is objected to as immaterial.

The COURT. Sustained.

Mr. DANELLA. Exception.

Attilio Muoio, testified that he resides in the City of Utica, New York and is a traveling salesman employed by Pastene Corporation of Boston, Massachusetts. That he and his firm have done business with Henry Alberico and the firm of Alberico & Funicello for the past sixteen (16) years and have sold them olive oil and other food products. That from the speech of the people in the vicinity where Henry Alberico resides, he knows his reputation for being a law-abiding citizen, that it is good, in fact, very high.

Senator Paladino, testified that he resides in the City of Utica, and is in the business of a wholesale and retail grocery. That he is acquainted with Henry Alberico and has had business relations with the firm of Albercio & Funicello for the past thirty (30) years. That in the course of his business dealings

165 with the firm of Alberico & Funicello he has bought sugar and five-gallon tin cans on many occasions. The cans were used by him to contain olive oil. That the witness bought olive oil in drums and repacked it into five-gallon tin cans purchased from Alberico & Funicello. The witness also testified that from the speech of people in the community where Henry Alberico lived, he knew the reputation of Henry Alberico for being law-abiding, that it was very good.

Alfred Rossi, testified that he resides in the City of Auburn, New York, and is engaged in the business of manufacturing macaroni.

That he knows Henry Alberico and has sold the firm of Alberico & Funicello macaroni for a period of the past twelve (12) or thirteen (13) years. That he knows the reputation of Henry Alberico as a law-abiding citizen and that it is good.

Cross-examination

The witness has sold the firm of Alberico & Funicello about $20,000.00 worth of macaroni every year for the past twelve (12) or thirteen (13) years. That the firm of Alberico & Funicello is a good customer and that Henry Alberico is the buyer for the firm.

Fred C. Grieco, testified that he resides in the City of Utica, and has been acquainted with Henry Alberico for the past fifteen (15) years. That the witness was formerly a Captain of Police in the Utica Police Department, and served for a period of twenty-three (23) years when he was retired under a pension on the 27th day of February 1939. That he knows the reputation of Henry Alberico as a law-abiding citizen in the community in which he lives, and that his reputation is good. The witness knows and is
166 familiar with a grocery store located on Mohawk Street in the City of Utica, between Jay and Catherine Streets. That this grocery store has been there for several years and has been operated by the Morreale family.

Cross-examination

The grocery store was operated by the mother of Salvatore Morreale.

Nathan W. Cook, testified that he resides in the City of Utica and is employed by the Broadcasting station of WIBX, located in Utica, New York and he is also the Secretary of the Central New York Retail Merchants Association. That he is acquainted with the firm of Alberico & Funicello and knows that for at least the last six (6) years this firm has been engaged in the wholesale grocery business. That he knows from the speech of the people in the community in which Henry Alberico resides, that his reputation as a law-abiding citizen is excellent.

Cross-examination

The witness was official announcer over the radio for the firm of Alberico & Funicello over station WIBX for a period of two years.

Motions

THURSDAY MORNING, JUNE 15TH, 1939.

Appearances: (Same as before)

Mr. JOSELIT. If the Court please: The Government rests.

The COURT. Have the Counsel for any of the defendants any motions they desire to make, and if so would you prefer to make them in the absence of the jury?

Mr. PRIOR. I think that would be well.

The COURT. Have you any idea how long it would take?

167 Mr. PRIOR. I do not think as long as the motions at the close of the Government's case.

The COURT. Half an hour?

Mr. PRIOR. I think more than that.

Mr. BALDWIN. Three-quarters of an hour.

The COURT. I will excuse the jury then until quarter after eleven.

(At 10:35 a. m. the jury was excused until 11:15 a. m.).

The COURT. As I recall, there were two motions made at the close of the Government's case to strike evidence on which I reserved decision. One was a motion made by Mr. Baxter and I assume from the testimony that Mr. Capecelatro has given since the Government rested that that becomes an academic question so that it is not necessary to rule because Mr. Capecelatro as I recall his testimony it was given to correct an error which he made which was the basis of Mr. Baxter's motion. Am I correct in that, Mr. Baxter?

Mr. BAXTER. Yes, sir; excepting I prefer the record be purged of that error.

The COURT. That is, you now move to strike Capecelatro's testimony which he gave mistakenly?

Mr. BAXTER. Yes, sir.

The COURT. The motion is granted.

Mr. BAXTER. I thank you, Your Honor.

The COURT. And I believe, Mr. Byrne, you made a motion that I reserved decision on, is that so?

Mr. BYRNE. I think so, Judge. I made several.

The COURT. I will look it up from my notes.

Mr. PRIOR. In behalf of the Defendant Salvator Falcone I renew the motion made at the close of the Government's case on the same ground as stated at that time, and I make

168 the motion now upon the whole case for a dismissal of the indictment.

The COURT. The motion is denied.

Mr. PRIOR. In behalf of the Defendant Joseph Falcone I renew the motion made at the close of the Government's case for

a dismissal of the indictment and make it upon the same grounds as stated at that time and I now make it upon the whole case.

The CORHT. The motion is denied.

Mr. PRIOR. Give me an exception to each denial.

The COURT. Yes.

Mr. PRIOR. In behalf of the Defendant Salvatore Falcone I move for the direction of a verdict of acquittal on the ground that the Government has failed to prove a case; on the ground there is no question of fact to submit to the jury as to him, and on the ground any verdict rendered would be contrary to the law and against the evidence and against the weight of the evidence.

The COURT. The motion is denied.

Mr. PRIOR. Exception.

On behalf of the Defendant Joseph Falcone I move for the direction of a verdict of acquittal on the ground the Government has failed to prove a case; on the ground there is no question of fact to submit to the jury as to him; on the ground that any verdict rendered adverse to him would be contrary to the law and contrary to the evidence and against the weight of the evidence.

The COURT. Motion is denied.

Mr. PRIOR. Exception. Give me an exception to each denial.

* * * * *

Mr. DANELLA. As to the Defendant Henry Alberico, I re-
169 new the motions made at the end of the Government's case for a dismissal of the indictment on the grounds stated at that time.

The COURT. The motion is denied. You may have an exception.

Mr. DANELLA. I move for a directed verdict of not guilty against the same defendant on the ground that the Government has failed to make out a prima facie case; on the ground that any other verdict rendered by the jury as against this defendant would be against the weight of evidence.

The COURT. The motion is denied.

Mr. DANELLA. Exception.

Mr. BYRNE. In behalf of the Defendants John Nole, Nicholas Nole, Joseph Bonanzo, George Bonanzo and Salvatore A. Graniero I desire to renew my motion made at the close of the Government's case for a dismissal of the indictment on the grounds stated at that time, and upon the further grounds that the Government has entirely failed to prove the existence of a general conspiracy alleged and set forth in the indictment beginning September 1934 and terminating in October 1938 and that no such general conspiracy has been established by the proof; that these Defendants, and each of them, have not by any probative evidence been connected or

associated with any such general conspiracy as alleged and set forth in the indictment.

The COURT. The motion is denied.

Mr. BYRNE. May I have an exception, several exceptions in each case?

The COURT. Yes.

Mr. BYRNE. I move for a directed verdict of not guilty for each and every one of the five Defendants on the same grounds, and on the further ground that any verdict of guilty rendered
170 upon the case as it now stands would be contrary to the law, contrary to the evidence and against the weight of evidence.

The COURT. The motion is denied.

Mr. BYRNE. May I have several exceptions for each of the Defendants?

The COURT. Yes.

Judge's charge

The Court:

Ladies and Gentlemen of the Jury: At the outset of my Charge I want to express the appreciation of the Court and of the Counsel for the close attention you have given each and every witness during this long and tedious trial. You have listened patiently and attentively for many days, and now the case will soon be submitted to you. I might use the phrase at this time the way that is commonly heard in commencement orations, that you have patiently waited for this day.

There are, as you know, twenty-four defendants on trial. I have had their names typed on a sheet of paper, together with the names of the Counsel who represent the various defendants, and this list, with the consent of all Counsel in the case I will submit to you as you retire to your jury room.

The defendants, with many others, are charged by an indictment with the crime of conspiracy. The facts that some who have been named as co-conspirators have not been called to trial, and the fact that others have pleaded guilty must not in any way influence you in your consideration of the evidence in this case and must not in any way influence you either in favor of or
171 against the defendants on trial at this time. Neither can you consider when you retire to the jury room the fact that the defendants have been named in an indictment as any evidence of guilt or innocence. An indictment is simply a charge. It charges these defendants with the commission of a certain crime, and the defendants are called here to court to answer that charge. The indictment is not any evidence of innocence or any evidence of guilt. The guilt, or lack of proof of guilt of each defendant must be determined from the proof that has been produced

in this case and from that alone. Each of the defendants, as you have been told by various Counsel, started this trial with the presumption of innocence and that presumption continues not only through the trial, but during your deliberations until you are satisfied that the evidence presented proves their guilt beyond a reasonable doubt.

The burden of proof is upon the Government. In other words, the defendants are not called upon to establish their innocence, but the Government has the burden of proving each essential and each element that is necessary to establish guilt. The burden being upon the Government, and the defendants not being required to establish innocence, no presumption can be drawn against any defendant from the fact he did not testify in his own behalf.

During the summations you have many times heard the words "beyond a reasonable doubt" mentioned. Those words, as used in criminal cases should not cause any confusion on your part. They should not be construed so strictly as to mean that the Government before it is entitled to receive a verdict at your hands has to prove the guilt of the defendants, or any of the defendants, beyond every possibility of a doubt. On the other hand, they should not be construed so liberally as to allow you to bring in a
172 verdict of guilt on suspicion, or surmise, or prejudice, or anything other than upon the facts.

The words should be construed in their ordinary everyday meaning. They simply mean that before you should bring in a verdict of guilt, the evidence should satisfy you men and women, experienced in the every-day affairs of the world, beyond a doubt for which you would have any good reason for entertaining.

You have several times during the summation been told that you are the exclusive judges of the facts. I will so charge that when you retire to your jury room you do become the sole and exclusive judges of the facts. These facts must be determined from your recollection of the admitted evidence. In your consideration of the case you must disregard any impressions you may have received from any unanswered question, or exhibit offered but not received, and in this connection I will instruct you that the Court's rulings on objections or motions must not be taken as any indication of guilt or innocence of the defendants on trial.

In acting as judges of the facts you will have to determine the weight or credibility to be given to the testimony of each and every witness and to each exhibit. In doing this; that is, in determining how much weight or belief you shall give to the testimony of any witness, you have the right to consider the appearance of the various witnesses on the stand, their frankness or reluctance in answering questions, their manner of testifying, their intelligence, their connection with the case, their interest in the

outcome of the case or in any of the parties connected with the case their means of observation, and all other facts and circumstances connected with the giving of the testimony. If
173 you believe any witness has been mistaken concerning anything about which he or she has testified, you have the right to disregard that part of that witness's testimony and consider the balance. If you believe any witness has deliberately falsified concerning anything about which he or she has been questioned, you have the right to disregard that part of the witness's testimony and consider the balance, or you have the right to disregard the testimony of that witness as a whole.

Some of the defendants have called witnesses to testify to their reputation in the communities in which they dwell. These are commonly called character witnesses. In criminal cases their testimony is always competent and should be considered as one of the facts in the case. It sometimes happens that this evidence, if believed, is so strong and the nature of the offense charged is so foreign to that evidence, that that evidence, if believed, creates a reasonable doubt where otherwise the evidence would not so create.

Some of the witnesses named in the indictment as co-conspirators and some who have pleaded guilty have testified before you. The fact that they were named as co-conspirators and the fact that they have pleaded guilty and have not been sentenced does not make them incompetent as a witness. However, those facts should be borne in mind in your consideration of the evidence.

While you are the exclusive judges of the facts, you must in considering the facts bear in mind that the United States Government is not on trial in this case. Neither are any agents or officials of the United States Government on trial in this case. While acting as judges in this case you must determine the facts as they have been presented from the witness stand. Several of the witnesses called by the Government are agents in
174 some governmental department. That does not entitle them to any more or any less credence. Their credibility, the worth and weight of their evidence should be determined by you the same as you determine the belief that you will give to each and every other witness in the case.

The indictment, as I said before, charges these defendants and many others with the crime of conspiracy. The United States statute, in substance, states that if two or more persons conspire to either commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties commit any act to effect the object of the conspiracy, then the parties so conniving are guilty

of the crime of conspiracy. That is the statute under which this indictment was found.

There is a statute of the United States which makes it an offense for any person, or persons, to operate a still without complying with statutory regulations as to registration, furnishing of a bond, and so forth. The purpose of that statute is twofold: One, to assure or to prevent the passing out to the public of liquor not made in accordance with certain standards; and the other to prevent the evasion of the collection and payment of internal revenue taxes. There is also another statute which makes it an offense to sell alcohol unless it bears government tax.

Now it is the charge in this indictment that these defendants on trial, with many others, conspired or planned together to violate those two statutes, One, the statute providing the registration of stills, and so forth, and the other, the statute making it an offense to sell alcohol without the payment of a tax thereon. You can thus see that the gravemen of the offense charged in this indictment is not the operation of the illicit stills.
175 Neither is it the selling of untaxed alcohol, but, rather, it is the charge that these defendants, with others, planned, connived, or schemed, or arranged, to operate stills and to manufacture and sell untaxed alcohol, and that one or more of the persons named in the indictment did some act toward carrying that scheme into effect.

In order to convict under the indictment, the evidence must satisfy you on three points:

First, that two or more persons joined in a plan, a scheme, an arrangement—it matters not what you call it—either to commit an offense against the United States, or to defraud the United States of some of its revenue.

Second, that some one of them did something to carry the scheme into effect.

And third, that the defendants on trial were in some way and in some degree knowingly connected with the plan.

Now it most always happens that the crime of conspiracy has to be proven, if proven at all, by circumstantial evidence. The very nature of the offense explains why this is so. Persons who connive together for an unlawful purpose do not usually talk of their plans where they will be overheard, nor do they make their arrangements in the open. This case is of such a character. Your determination of whether a conspiracy existed and whether the defendants were a part thereof must be made largely from a study of the acts of the various parties alleged to be connected with the scheme, from a study of the nature of those acts, with the accompanying circumstances; the character of the transactions, or series of transactions; the associations of the parties and

their connections with the various acts; and from a study of all of the other facts and circumstances which have been established.

176 If the facts established lead you to the conclusion that a conspiracy existed, and if the evidence excludes every other theory, or hypothesis but that of conspiracy and the connection of the parties with the crime, then the crime is proven as effectively as though a formal or express agreement to conspire has been shown.

In other words, the facts and the circumstances, as established by the testimony and the exhibits received in evidence must be inconsistent with innocence and consistent with guilt. If an inference of innocence can be drawn from the facts and circumstances of the case as logically as one of guilt, then the burden of establishing guilt has not been sustained.

A person may be guilty of the crime of conspiracy even though he has nothing to do with the formation of the plan, and even though he did not know of such a scheme until long after its inception. He may be guilty of the crime even though he did not know all of the details of the plan, or the operations thereof, and even though he did not know all of the parties connected therewith. It is sufficient if the evidence establishes directly or under the rules I have given circumstantially that such an arrangement, or scheme, or plan, existed, and that he, knowing there was such a plan, or scheme, or arrangement, in existence, did anything to help effectuate or carry on the purposes thereof.

If a person becomes a party to a conspiracy, either by being a party at its inception, or by knowingly doing anything after that plan, or scheme, is formed, to carry it into effect, then he becomes liable for all acts that were done prior to his joining with the same effect as though he had been a conspirator

177 from its very inception. In other words, they are said to be partners in crime. What one does and says pursuant to their common purpose, all do and say.

Now it is the contention of the Government that it has established beyond a reasonable doubt the existence of a conspiracy formed in this District both to violate federal laws and to defraud the Government of the collection of taxes, namely; that it has established beyond a reasonable doubt a plan, a concerted and continuing plan to manufacture and sell alcohol in the City of Utica and the surrounding territory without complying with the statutory requirements for the manufacture and sale. The Government further contends that in addition to establishing such a conspiracy, it has proven beyond a reasonable doubt that each of the defendants on trial in this case was cognizant that such a plan, or scheme, or arrangement, existed, and in some manner connected himself there-

with. In other words, it contends that each defendant on trial, even though he did not know the full scope of the scheme, or know of all activities, or names of all parties connected therewith, at the same time knew that there was such an arrangement in existence and that the purpose of it was to manufacture and sell illicit alcohol in and around Utica; and knowing of the purpose of that scheme, acted in some manner in helping carry it into effect.

The defendants claim the evidence fails to show conspiracy, and they also claim that it failed to show knowledge of conspiracy, or connection therewith, by the defendants on trial.

I do not propose to dwell in detail upon the evidence. Even though the trial has been long and the evidence voluminous, I am sure that you have a clear recollection of all salient and pertinent facts. During the past day and a half by Counsel who have
178 appeared for various defendants and Counsel in behalf of the Government, your attention to the evidence as it affects the various defendants and as it affects the general charge has been dwelt upon in more or less detail. While, as I charged you before, you must take your facts from your own recollection rather than from the statement of Counsel, yet I believe that their calling to your attention the testimony of various witnesses as it affects the general charge and the defendants is sufficient to bring about as you enter your jury room a clear and vivid recollection of the testimony. If in your consideration you are confused or uncertain about any parts of the testimony, you, of course, have the right to come into Court and ask for further instructions.

As you will recall, evidence was introduced showing the set-up and seizure of some twenty or twenty-two unlawful stills. The evidence on this phase in nearly all instances covered a description of the properties where the stills were located, description of articles found, methods of leasing, persons there found, descriptions of automobiles, and so forth. As I recall, with the exception of some three or four of these stills, all were seized within a period of some thirteen or fourteen months. The testimony regarding each still seizure, even though it does not connect any or only one or two defendants therewith, bears upon the question of the existence, or non-existence of a conspiracy. The testimony showing, or attempting to show, the similarity of the methods of leasing, the number of leases made by one man for unknown lessees, the similarity or materials and products found, the connection of some of the defendants, and identifying automobiles with two or more seizures, the method of furnishing bail or attorneys, as testified in one or two instances, the calling of a Cafe on at least two occasions when men operating were arrested, and all other facts testi-
179 fied to bear upon the question of whether a conspiracy existed. That is, they bear upon the question of whether

these various stills were erected and operated as independent stills, or whether they were erected and operated in accordance with some concerted plan, or arrangement, to violate the laws in relation to the manufacture and sale of alcohol in that vicinity.

If from all of the testimony in the case you find that the Government has failed to establish any concerted effort, or planned effort by two or more persons to over a period continuously, or at least spasmodically, violate the law, then it will not be necessary for you to consider the case further because if the Government has failed in its proof to establish a conspiracy, then of course these defendants could not in any be shown to be connected with the conspiracy which has not been established. If, on the other hand, you find that the testimony has established that the operations of the various stills, as they have been detailed by various witnesses, were made in accordance with a plan, or an understanding, or arrangement, that two or more persons were more or less continuously, or, as I said, at least spasmodically operating illicit stills in that vicinity, then your next question will be whether from the evidence these defendants, or any of them, were knowingly connected therewith.

Several witnesses were called by the Government who testified to association, to observed conversations between some of the defendants. In summations this evidence, as you will recall, has been commented upon at considerable length. You will recall that several witnesses were called in behalf of the defendants to prove that some, or at least two of the observations of association could not, as the defendants claim, have happened.

180 Now you will give the testimony introduced on this phase of the case such weight as it deserves, and no more. In your consideration you should bear in mind the limited purposes that such testimony serves. Its main purpose is to show acquaintanceship, and association, as one of the facts bearing upon the question of conspiracy and the defendant's connection therewith.

Now attempt has been made, as I recall, to show that in all the acts testified to on that phase of the case were illegal acts. They simply had a bearing, as I said, upon association, acquaintanceship, and opportunity, as one of the facts that you have a right to consider in connection with the testimony. Of course the testimony on this point, as the testimony on all other points has a bearing upon the credibility of witnesses.

As I have said before, during the past day and a half various Counsel have called your attention in particular to various parts of the evidence. I believe their efforts coupled with your recollection, sufficiently bring the facts to your minds vividly enough

so that it is not necessary for me to dwell in detail upon the evidence of any particular witness.

When you retire to your jury room you will consider all of the evidence in the case and first determine whether or not from that evidence a conspiracy has been proven; determine that regardless of whether or not these defendants, or any of the defendants, were connected therewith. In other words, does the evidence in this case satisfy you that all those stills were not operated as independent stills by independent operators, but rather that they were operated in accordance with a sort of a general arrangement, or plan, to more or less continually violate the law and defraud the Government? If that evidence on that point fails to convince you of conspiracy, then, as I said before,
181 you need go no further because your verdict under that conclusion would have to be not guilty as to all of the defendants.

If the evidence satisfies you that there was such a plan, then it is for you to determine from all of the testimony in the case whether the defendants, or any of them, at any time knew of the existence of such a plan, and if they did, if they did any acts, even though small, even though an innocent act, in furtherance of, or in help of, that plan.

If there was such a conspiracy and any defendant, or all of the defendants, knew in a general way the purposes and the existence of such a plan and did anything to carry it into effect, then they are guilty of the crime of conspiracy. If the evidence shows that there was a conspiracy and shows that some were knowingly connected with the conspiracy, and fails to show that others were so connected, then, of course, your verdict would be guilty as to the ones that the evidence sustains, and not guilty as to the others.

It has been said in the summation that this is an important case. Ladies and gentlemen of the Jury, it is important, and it has been a tedious and extensive case. It is important to the Government. Our Government, as a sovereign power, has the right to make laws and it has the right to insist that those laws be obeyed. If they are not obeyed and it produces evidence in Court sufficient to show that some person has violated those laws, then the jury should without hesitation, without fear, or any other ulterior motive, hold those persons accountable for their violations. On the other hand, it is important to the defendants. If the evidence fails in any degree to establish guilt, they, of course, should not then be held accountable for the charge.

182 When you retire, you may have the officer in charge bring you in all of the exhibits that have been introduced in this case if you care to study them, and, as I said before, if at

any time you become confused on any facts in the case, you have the right to ask for further instructions.

The COURT. Are there any exceptions?

Mr. JOSELIT. No requests on behalf of the Government.

Mr. PRIOR. I submitted to Your Honor some requests. Has Your Honor passed upon them?

The COURT. I think I covered most of them. I think I will stand on my general Charge.

Mr. PRIOR. Will you give me an exception?

Requests

Mr. PRIOR. May the Stenographer, if the Court please, have a copy of the original requests that I submitted to Your Honor?

The COURT. I will give him a copy.

Mr. PRIOR. And may Your Honor's statement that you would abide by your original Charge, I assume it is taken as a refusal to charge as I requested, except as you did charge, and I have an exception to Your Honor's refusals?

(Following are the requests to charge submitted to the Court by Mr. Prior:)

Mr. PRIOR. The defendant, Joseph Falcone, respectfully requests the Court to charge the jury as follows:

First: That the evidence in reference to the defendant, Joseph Falcone, is circumstantial evidence.

Second: That in a case of circumstantial evidence, unless the evidence excludes to a moral certainty every reasonable
183 hypothesis except that of guilt, the verdict of the jury must be not guilty.

Third: In a case of circumstial evidence, if the evidence points equally to an inference of innocence and to an inference of guilt, the jury must adopt the inference of innocence, and find the defendant not guilty.

Fourth: The jury may find an inference only from a fact.

Fifth: The jury may not build an inference upon an inference.

Sixth: There is no evidence that Joseph Falcone sold or diverted any sugar for any unlawful purpose.

Seventh: There is no evidence that Joseph Falcone sold or diverted any sugar for use in any operation of a still.

Eighth: There is no evidence that the defendant, Joseph Falcone, conspired with any person during the times charged in the indictment to violate a law of the United States.

Ninth: The defendant is presumed to be innocent all during the trial, during the deliberations of the jury, and until, and unless the jury are satisfied beyond a reasonable doubt of his guilt.

Tenth: The defendant is under no obligation to prove himself innocent.

Eleventh: The defendant is under no obligation to be a witness on his own behalf.

Twelfth: The failure to be a witness creates no presumption against him. The jury cannot consider it in any way against him.

Thirteenth: The defendant is not obligated to prove an alibi beyond a reasonable doubt.

Fourteenth: If the defendant's proof as to an alibi taken
184 into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty.

Fifteenth: The defendant, by his plea of not guilty, denies every material allegation of the charge against him.

Sixteenth: The burden is never on the defendant to establish his innocence. The burden is at all times upon the prosecution to establish the guilt of the defendant beyond a reasonable doubt.

Seventeenth: A reasonable doubt may arise from the evidence.

Eighteenth: A reasonable doubt may arise from lack of evidence.

Nineteenth: A reasonable doubt may arise from the character of the evidence.

Twentieth: A reasonable doubt may arise from the character of the witnesses.

Twenty-first: The indictment in this case charges only one conspiracy.

Twenty-second: The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third: If the jury find that the defendants, or some of them, were parties to a number of disconnected conspiracies, the verdict must be not guilty.

Twenty-fourth: Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth: Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth: To establish guilt, there must be wilful and knowing participation.

Twenty-seventh: The jury may not find a verdict of guilty on suspicion, guess, or surmise.

185 Twenty-eighth: The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

Mr. PRIOR. The defendant, Salvatore Falcone, respectfully requests the Court to charge the jury as follows:

First: That the evidence in reference to the defendant, Salvatore Falcone, is circumstantial evidence.

Second: That in a case of circumstantial evidence, unless the evidence excludes to a moral certainty every reasonable hypothesis except that of guilt, the verdict of the jury must be not guilty.

Third: In a case of circumstantial evidence, if the evidence points equally to an inference of innocence and to an inference of guilt, the jury must adopt the inference of innocence, and find the defendant not guilty.

Fourth: The jury may find an inference only from a fact.

Fifth: The jury may not build an inference upon an inference.

Sixth: There is no evidence that Salvatore Falcone was a partner with Joseph Falcone in the business of buying or selling sugar in the year 1937.

Seventh: The jury may not infer that Salvatore Falcone was in partnership with Joseph Falcone in the buying and selling of sugar in the year 1937, and from that inference infer that the sugar was used for an unlawful purpose.

Eighth: There is no evidence that the defendant Salvatore Falcone conspired with any person during the times charged in the indictment to violate a law of the United States.

Ninth: The defendant is presumed to be innocent all dur-
186 ing the trial, during the deliberations of the jury, and until, and unless the jury are satisfied beyond a reasonable doubt of his guilt.

Tenth: The defendant is under no obligation to prove himself innocent.

Eleventh: The defendant is under no obligation to be a witness on his own behalf.

Twelfth: The failure to be a witness creates no presumption against him. The jury cannot consider it in any way against him.

Thirteenth: The defendant is not obligated to prove an alibi beyond a reasonable doubt.

Fourteenth: If the defendant's proof as to an alibi taken into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty.

Fifteenth: The defendant, by his plea of not guilty, denies every material allegation of the charge against him.

Sixteenth: The burden is never on the defendant to establish his innocence. The burden is at all times upon the prosecution to establish the guilt of the defendant beyond a reasonable doubt.

Seventeenth: A reasonable doubt may arise from the evidence.

Eighteenth: A reasonable doubt may arise from lack of evidence.

Nineteenth: A reasonable doubt may arise from the character of the evidence.

Twentieth: A reasonable doubt may arise from the character of the witnesses.

Twenty-first: The indictment in this case charges only one conspiracy.

187 Twenty-second: The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third: If the jury find that the defendants, or some of them, were parties to a number of disconnected conspiracies, the verdict must be not guilty.

Twenty-fourth: Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth: Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth: To establish guilt, there must be wilful and knowing participation.

Twenty-seventh: The jury may not find a verdict of guilty on suspicion, guess, or surmise.

Twenty-eighth: The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

The verdict

The COURT. Court will stand in recess until the return of the jury.

The CLERK OF THE COURT. Court will be in recess.

(The jury retired at 10:40 A. M.)

(The jury found a verdict at 5:40 P. M.)

(At the request of the Counsel for the defendants the jury was polled.)

The COURT. Ladies and gentlemen, you may be excused for the Term, and the Court desires to thank you for the promptness with which you have attended all the sessions and the close

188 attention you have given to all of the evidence and the summations in the case. If you will retire to the Grand Jury room right in the rear of this courtroom Mr. Porter will be in in just a few minutes and make out your vouchers for you.

Are there any motions you wish to make at this time?

Mr. PRIOR. I think so, if Your Honor would like to hear them.

The COURT. All right.

Mr. BAXTER. Wouldn't it be better, if Your Honor please, to postpone the sentence until sometime next week, at which time

we might know what we would like to do? In most cases there might be a desire, possibly, to appeal.

The COURT. Well, you cannot appeal until the sentence is given.

Mr. BAXTER. That is why I asked that it be reserved until next week sometime and at that time we might be able to make our motions more concise.

The COURT. I am afraid it would be right the reverse.

Have you any objections?

Mr. JOSELIT. If the Court please, the Government has no objection to the postponement of sentence to such a date as the Court would fix.

The COURT. It, of course, will mean bringing all the attorneys and the defendants to Syracuse again. Will a majority of the Counsel prefer to have the sentences deferred?

Mr. PRIOR. I think so.

The COURT. Well then I will adjourn this Court until the 27th of June at ten o'clock and will allow the defendants to remain at liberty on the bail that is now on file.

189 CLERK. Gentlemen of the jury, have you agreed upon a verdict?

FOREMAN. We have.

CLERK. If so, how do you find?

FOREMAN. We find the defendants, Henry Alberico, Nicholas Blase, George Bonanza, Joseph Bonanza, Rocco Caruso, Joseph Falcone, Salvatore Falcone, Enrico Ferro, Salvatore A. Granerio, Lawrence Grimaldi, Daniel LaBella, Emmett Marrone, John Melito, Walter Melito, Frank Joseph Milozzo, Paul Mira, Dominick Morraele, John Nole, Nicholas Nole, Charles John Skora, and Frank Soldano, guilty, and the following defendants not guilty: Joseph Battaglia, Vincent Marrone, and Joseph Zapetti.

All sentences are deferred to June 27, 1939, at ten A. M., at Syracuse. Bail continued as to all defendants.

Motions to set aside verdict and for a new trial

Mr. PRIOR. On behalf of the defendant, Salvatore Falcone, I move to set aside the verdict and for a new trial. I make the motion on Your Honor's minutes. on the exceptions and on the ground that the verdict is contrary to the law, contrary to the evidence and against the weight of evidence.

The COURT. The motion is denied.

Mr. PRIOR. Exception.

On behalf of the defendant, Joseph Falcone, I move to set aside the verdict and for a new trial. I make the motion on Your Honor's minutes, on the exceptions, and on the ground that the

verdict is contrary to the law, contrary to the evidence and against the weight of evidence.

190 The COURT. The motion is denied.

Mr. PRIOR. Exception.

The COURT. Now, Mr. Danella?

Mr. DANELLA. On behalf of the defendant, Henry Alberico, I move to set aside the verdict of the jury and ask for a new trial, on the ground that the verdict was against the weight of evidence and contrary to the law.

The COURT. The motion is denied.

Mr. DANELLA. Exception.

Sentence

On June 27th, 1939, at Syracuse, New York, the following sentences were imposed by the Court:

That the defendant, Henry Alberico, be confined in any institution designated by the Attorney General for one year and one day and pay a fine of $3,000.00 and stand committed until paid.

That the defendant, Nicholas Blase, be confined in the Oneida County jail for six months.

That the defendant, George Bonanza, be confined in any institution designated by the Attorney General for one year and one day.

That the defendant, Joseph Bonanza, be confined in the Oneida County jail for four months.

That the defendant, Rocco Caruso, be confined in the United States penitentiary at Lewisburg, Pa., for one year and one day; execution of sentence suspended for four years and defendant to be on probation.

That the defendant, Joseph Falcone, be confined in any institution designated by the Attorney General for two years and pay a fine of $7,500.00 and stand committed until paid.

191 That the defendant, Salvatore Falcone, be confined in any institution designated by the Attorney General for one year and five months and pay a fine of $6,000.00, and stand committed until paid.

That the defendant, Enrico Ferro, (correct name Enrico Henry Garcea) be confined in the United States penitentiary at Lewisburg, Pa., for two years; execution of sentence suspended for five years and defendant to be on probation.

That the defendant, Salvatore A. Granerio, be confined in any institution designated by the Attorney General for two years.

That the defendant, Lawrence Grimaldi, be confined in any institution designated by the Attorney General for one year and eight months.

That the defendant, Daniel LaBella, be confined in the United States Penitentiary at Lewisburg, Pa., for one year and ten

months; execution of sentence suspended for four years and defendant to be on probation.

That the defendant, Emmett Marrone, be confined in the Oneida County Jail for six months; execution of sentence to be suspended for three years and defendant to be on probation.

That the defendant, John Melito, be confined in any institution designated by the Attorney General for one year and one day, and pay a fine of $1,000.00 and stand committed until paid.

That the defendant, Walter Melito, be confined in the United States Penitentiary at Lewisburg, Pa., for two years; execution of sen'ce suspended for five years and defendant to be on probation.

That the defendant Frank Joseph Milozzo, be confined in any institution designated by the Attorney General for one year and three months.

192 That the defendant, Paul Mira, be confined in the United States penitentiary at Lewisburg, Pa., for two years; execution of sentence suspended for four years and defendant to be on probation.

That the defendant, Dominick Morreal, be confined in the United States penitentiary at Lewisburg, Pa., for one year and six months; execution of sen'ce suspended for four years and defendant to be on probation.

That the defendant, John Nole, be confined in any institution designated by the Attorney General for one year and five months and pay a fine of $2,000 and stand committed until paid.

That the defendant, Nicholas Nole, be confined in any institution designated by the Attorney General for two years.

That the defendant, Charles John Skora, be confined in the United States penitentiary at Lewisburg, Pa., for two years; execution of sentence suspended for four years and defendant to be on probation.

That the defendant, Frank Soldano, be confined in any institution designated by the Attorney General for one year and four months.

193 *Government's Exhibits*

Exhibit 136

A lease made and executed Between Nancy Scalice of the City of Little Falls, New York, of the first part, and Antonio Laratro of the City of Utica, New York, of the second part, this 15 day of February, in the year One thousand nine hundred and thirty-seven.

In Consideration of the rents and covenants hereinafter expressed, the said party of the first part has Demised and Leased, and does hereby demise and lease to the said part of the second part, Antonio Laratro the following premises, viz: One family house (bung'low) situated at 1605 Girard St., Utica, N. Y., including with two-stall garage, situated in the rear of the house with the privileges and appurtenances, for and during the term of one year from the 1st day of March 1937 which term will end February 28th, 1938. And the said party of the second part covenant that he will pay to the party of the first part for the use of said premises, the monthly rent of Thirty Dollars ($30.00), to be paid in advance on 1st day of each of every month.

And Provided, Said party of the second part shall fail to pay said rent, or any part thereof when it becomes due, it is agreed that the said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.

The party of the first part agree to pay all the taxes to be assessed on said premises during said term of the Lease with the exception of the water bill will go to be paid by the party of the second part, every time a bill will be rendered.

The party of the second part covenant that at the expira-
194 tion of said term he will surrender up said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements expected.

Witness the hands and seals of the said parties, the day and year first above written.

NANZI SCALICE. [L. S.]
ANTONIO LARATRO. [L. S.]

Exhibit 142

International Heater Co. Stock Deliveries, Date 1-26, 1937. No. 19. 10-4020 Eion fu. 25-52262. 1-oil, 1-26563 Carton, 1-28 st front, 5-27" Eion, 1-6S28 ash pit. Mtg. Dept.

Exhibit 143

A. 175. Order. Utica, N. Y., 1/25, 1937. M International Heater Co. City. Ship to Smyth-Despard Co. 1 reg 6S-27 Int Boiler. 238.00, Less 10%. To be delivered by your truck to our plant 1-17-37. Confirming telephone Order to Mr. Rondugh. No Order Valid Unless Signed. Put Order No. On Invoice. Per EAL.

195 *Exhibit 144*

Invoice. International Heater Company, Utica, N. Y. Order Dated 1-25-37. Order Rec'd 12-5-37. Salesman Phone H. F. R.

Order No. 8209. Shipped to ———, via our truck. Invoice Date Jan. 27, 1937. Terms 2% 10th prox or net last day of that month. Sold to Smyth Despard Co., Broad Street, Utica, New York. Shipped from Utica. 1 #6-S-28 Int'l Economy Steam Boiler, 238.00; 10%, 214.20. Grunda, chg. 238.00. Pd. Feb. 10/37.

Exhibit 156

A lease, made and executed Between Vincenzo D'Amico of the City of Utica, New York, of the first part, and Salvatore Tania of the City of Utica, New York, of the second part, this 26th day of October, in the year One thousand nine hundred and thirty-six.

In Consideration of the rents and covenants hereinafter expressed, the said party of the first part has Demised and
196 Leased, and does hereby demise and lease to the said party of the second part, the following premises, viz.:

The entire house, two story high, frame bldg., and the annex garage, situated at 310 Picher St., Utica, N. Y. with the privileges and appurtenances, for and during the term of one year from the 1st day of November 1936 which term will end the 31st day of October 1937. And the said party of the second part covenant that he will pay to the party of the first part for the use of said premises, the monthly rent of twenty-six Dollars ($26.00), to be paid in advance on the 1st day of each of every month.

And Provided, Said party of the second part shall fail to pay said rent, or any part thereof when it becomes due, and also the party of second agree to pay all the water bill, it is agreed that the said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.

The party of the first part agree to pay all the taxes to be assessed on said premises during said term.

The party of the second part covenant that at the expiration of said term he will surrender up said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted

Witness the hands and seals of the said parties, the day and year first above written.

VINCENZO D'AMICO. [L. S.]
SALVATORE TANIA. [L. S.]

197 *Exhibit 165*

This agreement, made the 19th day of January in the year One Thousand Nine Hundred and Thirty-Seven, Between Dominick Luvara, of the City of Utica, Oneida County, New York, party of the first part, and Michael Kane, of the same Place, party of the second part,

Witnesseth, That the said party of the first part hath agreed to let, and hereby doth let, and the said party of the second part hath agreed to take, and hereby doth take, those certain premises situated in the city of Utica, New York, more particularly described as follows, to wit:

The garage situated at No. 726 Catherine Street, Utica, New York, for the term of one year to commence on the 19th day of January, 1937, and to end on the 19th day of January, 1938, at eight o'clock in the forenoon. The said party of the second part agrees to pay to the said party of the first part the monthly rent of $28., (twenty-eight Dollars) in monthly payments on the 19th day of each month in advance.

Party of the second part to pay the party of the first part at the time *ofensealing* and delivery of these presents, the sum of $84, (eighty-four Dollars), receipt whereof is hereby acknowledged said sum of $84., (eighty-four Dollars) shall be retained by the first party as security for the payment of the rent under this agreement and shall be applied upon the rent for the last three months of this lease.

And it is expressly Agreed, That if default be made in the payment of the rent, or any part thereof, or if the said party of the second part shall, without the written consent of the
198 party of the first part, let, sell, underlet or assign over, the said premises, or any part thereof, for the whole or any part of said term, or shall use said premises or any part thereof, for any other purpose than Private Garage.

Party of the second part shall pay for all gas, electric, and water used on the premises and shall furnish his own heat. Any and all repairs to the building shall be made by the party of the second part at his own expense after obtaining written consent from the party of the first part.

DOMINICK LUVARA. [L. S.]
MICHAEL KANE. [L. S.]

Exhibit 217

Land Contract between Leta B. Kenney of Utica, N. Y., and Ralph Lasonda, made on July 14, 1937, for the purchase of a farm known as the Jones Farm in the town of Remsen, near Russia, N. Y. This agreement made by the Law Firm of Lee, Brennan & Bastow of Utica, N. Y. Total purchase price $3,000 and a down payment $300.00.

Exhibit 268

A lease, made and executed Between Thomas Bonacci of the City of Utica, New York, of the first part, and Edoardo Mingo

of the City of Utica, New York, of the second part, this 28th day of September, in the year One thousand nine hundred and thirty-seven.

In Consideration of the rents and covenants hereinafter expressed, the said party of the first part has Demised and
199 Leased, and does hereby demise and lease to the said party of the second part, Edoardo Mingo, the following premises, viz:

A house situated in the rear of 910 Morris St., Utica, N. Y., with the privileges and appurtenances, for and during the term of one year from the 1st day of October 1937, which term will end the 30th day of September 1938. And the said party of the second part covenant that he will pay to the party of the first part for the use of said premises, the monthly rent of Twelve Dollars ($12.00), to be paid in advance on the first day of each month.

And Provided, Said party of the second part shall fail to pay said rent, or any part thereof when it becomes due, it is agreed that the said party of the first part may sue for the same, or reenter said premises, or resort to any legal remedy.

The party of the first part agrees to pay all the taxes to be assessed on said premises during said term of one year, and the party of the second part agrees to pay the water bill.

The party of the second part covenant that at the expiration of said term he will surrender up said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted.

Witness the hands and seals of the said parties, the day and year first above written.

THOMAS BONACCI. [L. S.]
EDOARDO MINGO. [L. S.]

200 *Exhibit 292*

A lease, made and executed Between Paoline Aiello, of the City of Utica, New York, of the first part, and Frank Summa of the City of Utica, New York, of the second part, this 27th day of December, in the year One thousand nine hundred and thirty-seven.

In Consideration of the rents and covenants hereinafter expressed, the said party of the first part has Demised and Leased, and does hereby demise and lease to the said party of the second part, the following premises, viz.:

One bungalow situated at 1166 Webster Ave., in the City of Utica, with the privileges and appurtenances, for and during the term of one year from the 1st day of January 1938, which term will end December 31st, 1938, and the party of the second part will have the privilege to buy the premises during the time of

such lease or renew the lease for another year on the same terms. And the said party of the second part covenant that he will pay to the party of the first part for the use of said premises, the monthly rent of thirty Dollars ($30.00), to be paid in advance on the first day of each month, and for guarantee, the party of the second party paid two months in advance.

And Provided, Said party of the second part shall fail to pay said rent, or any part thereof when it becomes due, it is agreed that the said party of the first part may sue for the same, or reenter said premises, or resort to any legal remedy.

The party of the first part agree to pay all the taxes to be assessed on said premises during said term, and the party of the second part must pay his own water bill.

201 The party of the second part covenant that at the expiration of said term he will surrender up said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted.

Witness the hands and seals of the said parties, the day and year first above written.

PAOLINE AIELLO. (L.S.)
FRANK SUMMA. (L.S.)

In the presence of Antonio Faga.

Exhibit 294

A battery card of the Firestone Tire & Rubber Co., dated bearing the number 326.

Exhibit 317

Utica Firestone Auto Supply & Service Stores. Firestone Tire & Rubber Company, Inc., 273 Genesee St., Phones 23138–39, Utica, N. Y. Date 12–9–37.

Name, John Melito. Address, 510 Elizabeth St.

3 days rental	75
Recharge	75
Service call	50
	2.00

202 No. 779–45.

Exhibit 334

A business card on the reverse side of which are the penciled numbers 29865.

Exhibit 387

Phone 2–6934 Walter.

Exhibit 392

15 ws. No. 60. Blake Transportation Lines, 60 N. Genesee St. Utica, N. Y. Harry Bohen, 244 Madison Ave., N. Y. C. 29865.

Exhibit 398

Know all men by these presents,

That I, Salvatore Falcone, have made, constituted and appointed, and by these presents, do make, constitute and appoint Joseph Falcone my true and lawful attorney for me and in my name, place and stead to deposit money or checks, receipt bills and to sign and endorse checks, drafts and bills of exchange, and to draw money from the First Bank and Trust Co., of Utica, N. Y., and, generally, to transact any and all business with and through the First Bank and Trust Co., of Utica, N. Y.,
for me; giving and granting unto my said lawful attorney
203 full power and authority to do and perform all and every
act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute shall lawfully do or cause to be done by virtue thereof.

In Witness Whereof, I have hereunto set my hand and seal the 20th day of March, Nineteen Hundred and thirty-six.

SALVATORE FALCONE.

UNITED STATES OF AMERICA,
State of New York, County of Oneida, ss:

Be it known that on the 20th day of Mar. Nineteen Hundred 36, before me personally appeared Salvatore Falcone, above named, who is to me known and known to me to be the person described in and who executed the above instrument, and who duly acknowledged the execution thereof to be his free act and deed.

In testimony whereof, I have hereunto subscribed my name the day and year last above written.

C. S. BROPHY,
Notary Public,
Oneida County, N. Y.

204 *Exhibit 399*

(Strike Out Any Paragraph Covering Powers Not To Be Included.)

Know all men by these presents:

That I, Joseph Falcone, of the City of Utica, New York, have made, constituted and appointed, and by these present do make, constitute and appoint Salvatore Falcone, of the City of Utica, New York, my true and lawful attorney for me and in my name, place and stead, from time to time:

1. (Endorsement for Deposit and Collection.) To endorse and deliver for deposit with, or collection by, First Citizens Bank and Trust Company of Utica (hereinafter called the Trust Company), any and all checks, drafts, promissory notes, certificates of deposit, or other orders or instruments for the payment of money.

2. (Signing Checks and Settling Accounts.) To sign in my name and deliver for me checks or drafts upon said Trust Company, whether against funds actually at the time standing to my credit or against or in anticipation of deposits to be made or funds to be placed to my credit thereafter; and to settle and adjust my accounts with said Trust Company.

3. (Acceptances.) To accept any and all drafts or bills of exchange or other orders for payment of money at any time drawn upon me, making the same payable at said Trust Company or otherwise directing the payment thereof by said Trust Company.

4. (To Sell Notes, Etc.) To sell to said Trust Company for my account any and all promissory notes, drafts or other orders for
205 the payment of money at any time drawn and endorsed payable to my order or generally, and to endorse the same generally or without recourse for the purpose of such sale.

5. (Borrowing and Giving Security.) To borrow in my name from said Trust Company such sum or sums of money as my said attorney may think proper, and to make, sign, execute, and deliver in my name, one or more promissory note or notes, draft or drafts, or other order or orders for the payment of money, and as security for the repayment of any such loan or loans to pledge or hypothecate any and all commercial paper, bonds, stocks, certificates of deposit, or other securities or choses in action held by me or by my said attorney, and to execute and deliver any and all such endorsements or instruments of assignment or transfer as may be necessary, expedient, or customary in like cases to effectually transfer the security so pledged to said Trust Company.

6. (Contracts.) To make any agreements or contracts verbally or in writing with or without seal with said Trust Company, as

my attorney may deem proper and to execute and deliver the same on my behalf.

7. (Time.) This power of Attorney shall remain in full force and effect until after I have personally served or caused to be served a written notice of the revocation hereof upon the said First Citizens Bank and Trust Company of Utica.

8. (Special.) ----------

Hereby giving and granting unto my said attorney full power to do and perform every act whatsoever requisite and convenient to be done in the premises as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying all that my said attorney or substitute shall do or cause to be done by virtue hereof.

206

In witness whereof, I have hereunto set my hand and seal this 31st day of March in the year one thousand nine hundred and thirty-seven.

JOSEPH FALCONE. [L. S.]

In presence of
T. S. MCNICHOL.

STATE OF ARKANSAS,
County of Garland, ss.

On this 31 day of March 1937, before me personally came and appeared Joseph Falcone, to me personally known and known to me to be the same person described in and who executed the foregoing Instrument, and he duly acknowledged to me that he executed the same.

[SEAL] THERESE S. MCNICHOL,
Notary Public,
Garland County.

Exhibit 400

A photostat copy of the signature card of S. Falcone & Bros., dated 12/7/31.

207

Exhibit 405

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Total

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 1.

UTICA, N. Y., *Mch. 1, 1937.*

Pay to the order of Turner Bros., $2,714.60. Exactly $2,714 & 80 Cts., Dollars. First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

JOSEPH FALCONE.

(Endorsed:) Turner Bros. Pay to the order of National City Bank. Turner Brothers Sugar Brokers, Inc.

208 *Exhibit 406*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Total.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 6.

UTICA, N. Y., *Mar. 9, 1937.*

Pay to the order of Turner Bros., $9,319.80. Nine thousand three hundred and nineteen and 80/100, Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Pay to Hudson Sugar Co. Turner Bros. Turner Bros. Sugar Brokers, Inc., E. J. Hertzal, V. P.

R. Pay to the order of R. The Public Nat'l. Bank and Trust Co. of N. Y. Hudson Sugar Corp. #4910.

209 *Exhibit 407*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Mar. 31, 1,000 bags of sugar, $4,775.00. Total.

Less Frt. %. Less Disc. 2%, $95.50. Total Deductions. Net Amt. of Check, $4,679.50.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 25.

UTICA, *March 31, 1937.*

Pay to the order of First Citizens Bank & Trust Co. $4,679.50, the sum 4679 DOL'S 50 Cts., Dollars.

By SALVATORE FALCONE, *Atty.*

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) for myself. 8816.

210 *Exhibit 408*

Peoples Office. 50–76. First Citizens Bank and Trust Company of Utica. Number P–8816.

UTICA, N. Y., *Mar. 31, 1937.*

Pay to the order of Greenspan Bros. Co. $4,679.50. Exactly $4,679 & 50 Cts., Dollars.

O. S. BROPHY, *Manager.*

To The First National Bank. 1–65. New York. 1–65.

(Endorsed:) Deposit account Greenspan Brothers Co.

Exhibit 409

Peoples Office. Credit First National Bank, New York. No. P–8816. For Draft Issued Mar. 31, 1937.

Pay to the order of Greenspan Bros. Co. $4,679.50. Exactly $4,679 & 50 Cts., Dollars. Offset. Ch. Joseph Falcone. By S. Falcone, Attorney. Issued by AP.

211 *Exhibit 410*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. 1,000 bags of sugar, $4,775.00. Total.

Less Frt. %. Less Disc. 2%. Total Deductions, $95.50. Net Amt. of Check $4,679.50.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 27.

UTICA, N. Y., *April 7, 1937.*

Pay to the order of Greenspan Bros., $4,679 50/100. Rubin Sales Co., Incorporated, 4,679 DOLS 50 Cts., Dollars.

By SALVATORE FALCONE,
Atty.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) For Deposit %. Greenspan Bros. Co.

212 *Exhibit 411*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. For 1,000 Bags. Total, $4,679.50.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check, $4,679.50.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 57.

UTICA, N. Y., *April 23, 1937.*

Pay to the order of Turner Bros. Sugar Brokers, Inc., $4,679.50. The sum of 4,679 DOLS 50 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Turner Bros. Sugar Brokers, Inc.

E. J. HERTZEL, *V. P.*

For Deposit. Greenspan Bros. Co.

213 *Exhibit 412*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Total.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 88.

UTICA, N. Y., *June 29, 1937.*

Turner Bros. Sugar Brokers, $4,385.50. Four thousand three hundred Eighty-five 50/100 Dollar.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Pay to L. Hoffman. Turner Bros. Sugar Brokers. Turner Bros. Sugar Brokers, Inc.

E. J. HERTZEL, *V. P.*

214 *Exhibit 413*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice, Amount. account. Total $5,000.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check, $5,000.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 103.

UTICA, N. Y., *Sept. 9, 1937.*

Pay to the order of Sucrest Corporation, $5,000 00/100. Exactly $5,000 & 00 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Pay to the order of The Commercial National Bank & Trust Company of New York. Sucrest Corporation.

215 *Exhibit 414*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Loan. Total $5,000.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check $5,000.

Salvatore Falcone, Retail Wines and Liquors, 259 Genesee Street. No. 2783.

UTICA, N. Y., *Sept. 9, 1937.*

Pay to the order of Joseph Falcone, $5,000 00/100. Exactly $5,000 & 00 Cts., Dollars.

SALVATORE FALCONE,
By JOSEPH FALCONE,
Atty.

First Citizens Bank and Trust Company. Peoples Office. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Pay to the order of First Citizens Bk. & Trust Co. Peoples Office. Joseph Falcone, Bleecker St.

216 *Exhibit 415*

(Certified Check)

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. In full of acct. Total $4,702.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check $4,702.

Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St. No. 107.

UTICA, N. Y., *Sept. 13, 1937.*

Pay to the order of Sucrest Corporation, $4,702 00/100. Exactly $4,702 & 00 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

(Endorsed:) Pay to the order of The Commercial National Bank & Trust Company of New York. Sucrest Corporation.

217 *Exhibit 418*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Load, $354.82. Owed, $306. Total, $48.82.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check $48.82.

S. Falcone & Bro., Wholesale Grocers, 550 Bleecker St. No. 1950.

UTICA, N. Y., *Sept. 21, 1937.*

Pay to the order of A. J. Motor Express, $48.82/100. Exactly $48 & 82 Cts., Dollars.

S. FALCONE & BRO.
By JOSEPH FALCONE.

First Citizens Bank and Trust Company. Peoples Office. 50–76. Utica, N. Y. 50–76.

218 *Exhibit 420*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. Frt. in full to April 10/37. Total $697.20.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check, $697.20.

Joseph Falcone, Importer and Wholesale Grocer, 556 Bleecker St. No. 31.

UTICA, N. Y., *April 15, 1937.*

Pay to the order of Anthony J. Greco, $697 20/100. Exactly $697 & 20 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

219 *Exhibit 420–A*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. In full Payment of Inv. to date. Total $136.80.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check $136.80.

Joseph Falcone, Importer and Wholesale Grocer, 556 Bleecker St. No. 54.

UTICA, N. Y., *April 20, 1936.*

Pay to the order of Anthony J. Greco, $136.80/100. The sum of 136 DOL' 80 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

220 *Exhibit 420–B*

Endorsement of this Check acknowledges payment of the following. If incorrect please return. Date. Invoice. Amount. In full Payment of Invoice 9/17/37. Total $354.82.

Less Frt. %. Less Disc. Total Deductions. Net Amt. of Check $354.82.

Joseph Falcone, Importer and Wholesale Grocer, 556 Bleecker St. No. 111.

UTICA, N. Y., *Sept. 21, 1937.*

Pay to the order of Anthony J. Greco, $354.82/100. Exactly $354 & 82 Cts., Dollars.

JOSEPH FALCONE.

First Citizens Bank and Trust Company. 50–76. Utica, N. Y. 50–76.

221 *Exhibits 423 and 423–A to K*

Photographic copies of the bank statements of Joseph Falcone at First Citizens Bank and Trust Co. of Utica for the year 1937.

Exhibits 424 and 424–A to I

Photographic copies of the bank statements of Joseph Falcone at First Citizens Bank and Trust Co. of Utica, N. Y., for the year 1937.

Exhibit 426

Alberico & Funicello, Wholesale Grocers, 776 Bleecker Street. No. 15898.

UTICA, N. Y., *April 24, 1937.*

Pay to the order of Joseph Falcone, $1,500 00/100. Fifteen Hundred and 00/100, Dollars.

ALBERICO & FUNICELLO.
By HENRY ALBERICO.

To the Oneida National Bank and Trust Company of Utica. 50–77. Utica, N. Y.

222 *Exhibit 427*

By endorsement this check is accepted in full payment of the following account.

Date	Amount
2/19	$500
30	1,000
Total of Invoices	1,500

Less % Discount. Less Freight. Total Deductions. Amount of check $1,500. If incorrect please return. No receipt necessary.

Alberico & Funicello, Wholesale Grocers, 776 Bleecker Street. No. 15976.

UTICA, N. Y., *May 10th, 1937.*

Oneida National Bank and Trust Company. 50–77. 2.

Pay to the order of Joseph Falcone, $1,500.00. Fifteen Hundred and 00/100, Dollars.

ALBERICO & FUNICELLO.
By HENRY ALBERICO.

223 *Exhibit 430*

Nicholas Nole, National Grain Yeast Agency. No Protest 1–752. No. 755.

SYRACUSE, N. Y., *May 5th, 1938.*

Pay to the order of National Tin Can Manufacturing Co., Inc., $62.40. Sixty-two & Forty Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Exhibit 430–A

Date. Items. Amount. 66 bags @ $4.55, $300.30.
Nicholas Nole, National Grain Yeast Agency. N. P. 50–76. No. 751.

SYRACUSE, N. Y., *April 29, 1938.*

Pay to the order of P. F. Scheidelman & Sons, Inc., $300 30/100. Three Hundred and 30/100, Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

224 *Exhibit 430–B*

Nicholas Nole, National Grain Yeast Agency. N. P. 50–76. No. 792.

SYRACUSE, N. Y., *July 5, 1938.*

Pay to the order of P. F. Scheidelman & Sons, Inc., $409 40/100. Four Hundred Nine and 40/100 Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Exhibit 430–C

Nicholas Nole, National Grain Yeast Agency. N. P. 50–76. No. 805.

SYRACUSE, N. Y., *July 19, 1938.*

Pay to the order of P. F. Scheidelman & Sons, Inc., $399 50/100. Three Hundred Ninety-nine & 50/100 Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

225 *Exhibit 430–D*

Nicholas Nole, National Grain Yeast Agency. No. 627.

SYRACUSE, N. Y., *July 10, 1937.*

Pay to the order of Atlantic Yeast Corporation, $45.00. 45 DOLS. 00 Cts., Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Exhibit 430–E

Nicholas Nole, National Grain Yeast Agency. No. 631.

SYRACUSE, N. Y., *July 19, 1937.*

Pay to the order of Atlantic Yeast Corp., $108.00. One-Hundred-Eight and no/100 Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

226 *Exhibit 430–F*

Date. Items. Amount. For week of July 19 to 24th. Nicholas Nole, National Grain Yeast Agency. No. 636.

SYRACUSE, N. Y., *July 26, 1937.*

Pay to the order of Atlantic Yeast Corporation, $126.00. One-Hundred-Twenty-Six and no/100, Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Exhibit 430–G

Nicholas Nole, National Grain Yeast Agency. No. 637.

SYRACUSE, N. Y., *August 2, 1937.*

Pay to the order of Atlantic Yeast Corporation, $90.00. 90 DOL's 00 Cts., Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

227 *Exhibit 430–H*

Date. Items. Amount. Week ending Aug. 7, 1937. Nicholas Nole, National Grain Yeast Agency. No. 640.

SYRACUSE, N. Y., *Aug. 9, 1937.*

Pay to the order of Atlantic Yeast Corp., $63.00. Sixty-Three and no/100, Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Nicholas Nole, National Grain Yeast Agency. No. 646.

SYRACUSE, N. Y., *Aug. 17, 1937.*

Pay to the order of Atlantic Yeast Corp., $54.00. Fifty-Four and no/100, Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

228 *Exhibit 430–J*

Nicholas Nole, National Grain Yeast Agency. No. 808.

SYRACUSE, N. Y., *Aug. 5, 1938.*

Pay to the order of The Wm. Trimbly Co., $132 20/100. One Hundred & Thirty Two 20/100 Dollars.

NICHOLAS NOLE.

First Trust & Deposit Company, West Onondaga Street Office, Syracuse, N. Y. 50–38. Collectible at par through the Federal Reserve Bank of New York.

Exhibit 435

STATE OF NEW YORK,
County of Oneida, City of Utica, ss.

I, do hereby certify, in pursuance of Section 440 of the Penal Law, that Rocco Robertaccio and (1) (2) now intend to conduct and transact business in the City of Utica, New York, under the name and style of (3) "Acme Yeast Company."

And I do further certify that the true and real full names of the persons (2) who now who intend to conduct and transact the same,

together with the residence and business addresses of said persons, (4) are as follows, viz:

Age, If Infant (4).

229 Name, Rocco Robertaccio; residence, 401 Jefferson Ave.; city or town, Utica, N. Y.

And I do further certify that successors in interest to who have heretofore used such name to (2) Carry on, conduct, transact such business.

In witness whereof, I have this 25th day of May 1937, made and signed this certificate.

ROCCO ROBERTACCIO.

STATE OF NEW YORK,
County of Oneida, City of Utica, ss.:

On this 25 day of May, in the year One thousand nine hundred and thirty-seven, before me, the subscriber, personally appeared Rocco Robertaccio to me personally known to be the same person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

SANTO FERRARO. [SEAL],
Notary Public, Oneida Co., N. Y.

230 *Exhibit 438*

Return by producer or importer. Return by Producer or Importer of Raw Materials (To be rendered daily and in duplicate). Form #169 (Reg. #17). Internal Revenue Service. Alcohol Tax Unit, Dis. #2. (Substance) Yeast.

From Henry Moskowitz &7 Lispenard St., N. Y. C., 4/13/37 (Name and address of shopper submitting return). (Date submitted.)

Date of Shipment, 4/13; purchaser (Agent of Purchaser) (Person to whom delivered), H. *l*Wilde, 719 Harrison St., Syracuse, N. Y.; type (Lot. No.); quality, Cwt. for sugar, gal. for mol., 3,000#; method of shipment (R. R. car or vehicle Lic. Number & State (Name and address of *of* driver and operator's license number), Luckman Trucking Co. to Utica Freight Forwarding, 38 Bethune St., N. Y. C.

231 *Exhibit 444*

Alberico & Funicello, 774 Bleecker St., Utica, N. Y. Broker: Oscar J. Brucker.

MEMO

Date	Refiner	Bags	Total
1937			
Sept. 23	Sucrest	100	
28	"	100	
Oct. 6	"	100	
19	"	100	
Nov. 3	"	100	
10	"	100	
29	"	100	
Dec. 6	"	100	
13	"	100	
24	"	100	
28	"	100	
29	"	100	
	1937 Total	1,200	
232 1938			
Jan. 3	Sucrest	200	
3	"	200	
8	"	200	
12	"	200	
17	"	200	
26	"	400	
		1,400	

BUYER

Date	Refiner	Bags	Total
1938	Forward	1,400	1,400
Mar. 7	Sucrest	200	1,600
10	"	200	1,800
16	"	200	2,000
May 10	Manhattan	150	2,150
June 1	Sucrest	200	2,350
13	"	140	2,490
16	"	200	2,690
17	Nedicks	200	2,890
21	Sucrest	200	
	1938 Total		3,090

Exhibits 445 A to Z

Exhibits 445 a to z are copies of invoices from Turner Bros. showing sale of sugar to Alberico & Funicello between Sept. 23/37 to June 17, /38 totaling to 4,290 bags of 100 lbs. each.

233 *Exhibit 446*

MEMO

Joseph Falcone
556 Bleecker Street
Utica NY

Date	Refiner	Bags
1937		
Mch 1	Farr & Co	200
1	Peirless Sugar	400
9	Hudson	2,000
Apr 1	Greenspan	2,000
8	" 1,000	2,000
June 29	L. Hoffman	1,000
Sept 10	Sucrest	1,000
14	"	1,000
	Total 1937	9,600
		8,600

Exhibits 447 a to f

Gov. Exhibits 447 a to f: Copies of Invoice from Turner Brothers showing sale of sugar to Joseph Falcone from March 1, 1937, to Sept. 16, 1937, showing purchase of 8,600 bags of sugar of 100 lbs. per bag, and is same as Exhibit 446.

Exhibit 452

Gov. Exhibit 452. Record of shipment of sugar by Sucrest Corp. to Alberico & Funicello on June 18, 1938, of 110 bags of 100 lbs. each.

234 *Exhibits 459 a to n*

Gov. Ex. 459 a ton were copies of 16 invoices from the files of B. F. Scheidelman & Sons, Inc., Utica, N. Y., showing sales of 1,000 bags of sugar to Nicholas Nole from 4/29/38 to 9/23/38.

Exhibit 470

Government Exhibit 470 shows 24 invoices that between 10/19/37 and 11/10/37 the firm of Alberico & Funicello purchased from F. Bonomo & Co. 843 bags of sugar of 100 lbs. each at $5.50 per bag. That the purchases on each of the 24 occasions were from 2 bags to 47 bags purchased, and that on 14 of these occasions 27 bags were purchased.

Exhibits 466, 467, 470, 444, and U–U–1

Tabulation of Sugar Purchases Made by Alberico & Funicello, Utica, N. Y.

The following tabulation of sugar purchases made by the firm of Alberico & Funicello, as proved by the Government is printed herewith by stipulation instead of Exhibits 466, 467, 470, 444, and U–U–1.

	Number of purchases	From Whom Purchased	Total pounds bulk sugar	Average price per 100 lbs.
1937				
Jan	23	E. S. Damsky & Son	170, 100	$4.92–$5.00
Feb	15	do	210, 700	5.00
Mar	13	do	157, 700	5.00
Apr	8	do	31, 400	5.00
Do	1	Joseph Falcone	30, 000	5.00
May	1	do	30, 000	5.00
Jun	1	do	30, 000	5.00
Do	8	E. S. Damsky & Son	17, 500	4.70–4.95
235 July	5	do	12, 500	4.70–4.65
Aug	6	do	19, 200	4.65
Sep	20	do	68, 600	4.65–5.30
Do	2	Turner Bros. Co	20, 000	4.85
Oct	2	do	20, 000	4.75–4.85
Do	2	F. Bonomo Co	2, 900	5.50
Do	4	E. S. Damsky & Son	8, 600	5.20
Nov	5	do	800	5.05
Do	18	F. Bonomo Co	50, 600	5.50
Do	3	Turner Bros. Co	30, 000	4.75
Dec	5	do	50, 000	4.65–4.90
Do	4	F. Bonomo Co	10, 800	5.50
Do	6	E. S. Damsky & Son	12, 900	4.95
1938				
Jan	6	Turner Bros. Co	132, 500	4.65
Mar	3	do	60, 000	4.55
Apr	2	E. S. Damsky & Son	4, 000	4.60
May	4	do	15, 900	4.60
Do	1	Turner Bros. Co	1, 500	4.42
Jun	5	do	91, 000	4.30
Do	2	E. S. Damsky & Son	5, 200	4.60
Sep			1, 700	4.45
			974, 300	
		Or 9,743 bags of 100 lbs. each.		

236 *Exhibit 473*

Sheet No. , Terms , Rating , Credit Limit , Account No. , Name, Frank Bonomo & Co., Address, 611 Bleecker St., City,

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
1937								1937
Mar. 11	200 B 5	1004	1,000—		500—	c1		Mar. 29
13	480 B 5	1010	2,400—		1,300—	c1		31
15	300 B 5	1012	1,500—		500—	2		Apr. 6
16	260 B 5	1014	1,300—	4,840—	1,400—	2		7
17	320 B 5	1015	1,600—	3,940—	900—	2		9
Apr. 3	140 B 5	1017	740—	2,540—	1,400—	2		13
10	240 B 5	1024	1,200—		500—	2		21
13	240 B 5	1025	1,200—		365—	3		June 1
14	20 B 5	26	100—	4,540—	500—	3		7
27	360 B 5	30	1,800—		920—	3		14
29	120 B 5	31	600—	6,940—	1,200—	3		25
30	20 B 5	33	100—	3,805—	250—	3		25
					2,200—	4		July 9
					1,319.05	4		17
July 2	180 Bags 4.85	1037	873—		970.00	c4		Aug. 6
2	220 Bags 4.85	38	1,067—		600—	c4		23
3	360 Bags 4.85	39	1,746—		600—	c5		Sept. 1
7	240 Bags 4.85	40	1,164—		444.65	5		13
					568—	5		16
Sept. 11	380 Bags 5.35	1041	2,033—		731.50	c5		Sept. 20
14	619 Bags 5.35	42	3,311.65		635—	5		21
15	660 Bags 5.35	43	3,531.00		503—	5		22
17	340 Bags 5.35	44	1,819.00		632.50	5		22
					532.50	5		23
					795—	5		29
					798—	5		30
					751—	5		Oct. 1
			29,084.65	7,045.45	224.00	c5		Oct. 8
					604.55	c6		Dec. 2
					851.55	"		7
					2,600.00	"		13
					734.65	"		28
					500.00	"		30
					588.90	"		31
					1,165.80	J1		Apr. 12
			29,084.65		29,084.65			

237 *Defendants' Exhibits*

Exhibit D

UNITED STATES OF AMERICA,
Northern District of New York, ss:

To Harvey DeWeese and Rome O. Chandler, civil officers of the United States, his agents or deputies, or any or either of them

Greetings, whereas, to be on oath and in writing, supported by affidavits as this day be made before me, Gordon Samuels, a United States Commissioner for the Northern District of New York, alleging that he has reason and does believe that in and upon certain premises within the Nor. District of , to wit, the premises known as Webster Avenue, and more particularly described as follows: a one story light-colored frame dwelling

house which is the second house northerly of Eagle Street on the westerly side of Webster Avenue and there is a vacant lot southerly of said dwelling, and is now located and concealed certain property used as the means of committing a felony, in violation of a law or laws of the United States, to wit: Sections 3258, 3281 and 3282 of the Revised Statutes, said property consisting of: fermenting mash, distilling apparatus and tax-unpaid alcohol,

Whereas, the particular ground for probable cause for the issuance of this search warrant consists of facts furnished by Harvey DeWeese, who personally appeared before me, the undersigned affidavit as follows:

238 That he is an Inv. in the A. T. U., assigned in the Northern District of N. Y., that he is familiar with the odor of fermenting and cooking mash; that he has received reliable information of an unregistered still in the above described premises on Jan. 19, 1938, between 4:30 P. M. and 6:00 P. M. and 8:00 P. M. and 12:00 P. M., and that he detected an odor of fermenting and cooking mash, alcohol and urea emanating from said premises and that the rooftop was void of snow while adjacent buildings were covered with snow; that on Jan. 20, 1938, between 6:00 P. M. and 12:00 P. M., he observed tin cans being taken from an automobile which drove up alongside said premises and carried to the basement of said premises said cans which are of the type commonly used in the transportation of tax-unpaid alcohol. Inv. Rome O. Chandler made a supporting affidavit that he observed the premises on Jan. 19 and 20, 1938 and detected an unmistakable odor of fermenting mash and alcohol emanating from the said premises. That he observed a car drive in to the driv'way of said premises without lights and men appeared to be carrying five-gallon tin cans from the car to the said house and that said car backed out on to the road without lights and he observed men carrying bags of sugar from the car to the house. and charging a violation of Sections 3258, 3281, and 3282 of the Revised Statutes; and

Whereas, this cause coming on for hearing on the application for a search warrant supported by affidavit as herein stated, and being satisfied of the existence of the grounds of said application and that there is probable cause to believe there existence:

Now, therefore, pursuant to Title XI of the Act of Con-

239 gress approved June 15, 1917, you are hereby authorized and commanded in the name of the President of the United States, to for'with enter said premises during the day time with the necessary and proper assistance and search the same and any building, room, closet, cellar or sub-cellar used in connection therewith for all such property hereinbefore specified, to

seize and to take the same into your possession, if found; to bring the said property before me, and to report and act concerning the same as required by law.

Witness my hand and seal, at Utica, N. Y. in said district, this 21st day of Jan. 1938.

[L. S.] GORDON SAMUELS,
U. S. Com. in and for the Northern Dist. of N. Y.

Return of search warrant

Ret'd this 22nd day of Jan., a. d., 1938, warrant served Jan. 21st, 1938 at 4:30 P. M., by making search as within directed with the assistance of the following persons: Rome O. Chandler, Howard Edwards, U. Creighton, Thomas Wilcox, Lippert and Honkale-Martin.

Upon said search I found and duly inventoried the seizure property as follows: 1-low-pressure boiler, 1-Still pot-1280 gallons, 1-lot of tools, 2-Steel pre-heaters-150 gallons, 6-sections copper columns-116 gallons, 2-Copper Dephlegmotors-222 gallons, 1-G. I. Condenser-140 gallons, 1-G. I. Receiving tank-224 gallons, 1-steel receiving tank-155 gallons, 8-steel mash vats containing 12414 gallons mash in still pot, 90-gallons distilled spirits, Total gallons mash-13694 gallons.

240 I, Harvey DeWeese, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

I further certify and swear that a copy of this warrant, together with a detailed receipt for the said liquor or property taken was[1] given[1] to Lorenzo Grimaldi, the person in whose possession it was found.

HARVEY L. DEWEESE.

Sworn to and subscribed before me this 22nd day of Jan. 1938.

GORDON SAMUELS,
United States Commissioner.

241 *Exhibit L*

Alberico & Funicello, Wholesale Grocers, 776 Bleecker Street. No. 15929.

UTICA, N. Y., *April 30th, 1937.*

Pay to the order of Joseph Falcone, $1,000.00, One Thousand and 00/100 Dollars.

ALBERICO & FUNICELLO.
By HENRY ALBERICO.

[1] Strike out the lines not needed.

To the Oneida National Bank and Trust Company of Utica, Utica, N. Y.

50–77. 2

(Endorsed:) Pay to order of First Citizens Bank & Trust Co., for deposit.

JOSEPH FALCONE.

(Perforation) Paid 5 12–27.

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242 *Exhibit N*

Established 1878. Incorporated 1931. Market Report, Turner Brothers, Sugar Brokers, Incorporated, New York and Philadelphia.

The tax situation: No new definite developments have come to the surface in the tax situation since our market letter of March 17th. The hearings before the subcommittee of the House have been held daily since last Monday and, as usual in proposed legislation of this sort, each group is recommending changes and amendments that would be beneficial to themselves. Just how long these hearings will have to be continued to give all interested parties a chance to testify is not known, but in some quarters the opinion is held the bill can not be whipped into final shape for presentation and passage by the House and Senate by April 1st. On the other hand, reports from Washington via the "underground route" indicate that there will be little or no delay beyond April 1st, and that there will not be any major changes in the bill from its original form. Of course, official or authentic information must of necessity be lacking at the present stage of the proceedings, and one man's guess is as good an another's when it comes to fixing the date when the tax will become effective. Under these circumstances, therefore, the only sure course to follow is for buyers to get sugar in their possession prior to April 1st.

243 Refined sugar: Prices remain unchanged on the basis of 4.80¢ for domestic sugars and 4.73¢ ex dock for off shores.

Snow White stocks are exhausted in Philadelphia and Baltimore and are running thin in New York. Interested buyers are urged to place their orders for this sugar immediately for prompt pickup or shipment.

Refiners continue to look at new business, shipment as soon as their facilities will permit, subject to confirmation. Withdrawals against existing contracts with American are also subject to confirmation, and this condition will undoubtedly prevail with

the other refiners the first part of next week. Arbuckle Brothers have made no further allotments since Tuesday.

To day National reiterated their previous announcement that they would endeavor to meet the demands of the trade prior to April 1st, taking into consideration date of receipt of specifications and, in the case of manufacturers' contracts delivery periods specified in the contracts. They also advise that they can not give consideration to make shipment or delivery of any sugar before April 1st against contract balances of January 4th basis 4.80¢ or against manufacturers contracts for first quarter delivery, unless specifications and shipping instructions are furnished before the opening of business March 23d, and then only to the extent that their facilities and available stocks will permit.

Oversales: Delays in shipments range from three to seven days. Buyers who are interested in submitting further new business should do so immediately, and the same applies to buyers who have not as yet filed specifications to complete undelwivered contract balances. In all cases refiners are not responsible
244 should it be impossible for them to complete shipments or deliveries before the tax becomes effective.

Raw sugar: Since our circular of Wednesday the market has been very quiet with interest confined to nearby sugars. The market has been slightly easier and on T'ursday operators secured 10,000 bags Porto Ricos due next week at 3.47¢ and yesterday Arbuckle, 5,000 bags due March 29th at 3.45¢, as against previous sales at 3.50¢. On the other hand the U. S. contract on the Exchange has been very firm, with lack of any selling pressure and quotations are unchanged to 2 points higher from Wednesday. Interest on the part of refiners in forward shipment position will evidently await action on the tax measure.

March 20, 1937.

Exhibit O

Established 1878. Incorporated 1931. Market Report, Turner Brothers, Sugar Brokers, Incorporated, New York and Philadelphia

The tax situation: There were practically no official or definite developments in the tax situation over the Easter holidays. The sugar section of the AAA is working on the bill at the present time, reconstructing such parts as the recent hearings before the House Agriculture Sub-committee would seem to justify. When the AAA has finished with its redraft of the bill it will be referred to the House. Agriculture Committee which, in
245 turn, reports it to the House. After this has been done the Committee must secure a rule from the Rules Com-

mittee permitting the makers of the bill to call it up for consideration.

While the bill, as originally written, specified that the tax be effective April 1st, owing to the delay that the proposed law has encountered, as announced in our market letter of last Thursday, final enactment into law will probably be deferred three or four weeks. In the meantime, one of the moot questions uppermost in the minds of the trade has been whether or not the tax would be made retroactive to April 1st. The opinion in the trade has been practically unanimous that it would not. Confirming this opinion Chairman Jones of the House Agricultural Committee made the following announcement today: "In view of the uncertainty of the enactment (of the sugar control bill) I feel that a tax in connection with any sugar legislation should be effective as of the date of final passage of the act rather than April 1st, and I shall so recommend." Later in the day, and following Chairman Jones' statement, Representative Cummings, Chairman of the House Agricultural Subcommittee, stated "As the bill was proposed it provided the tax to become effective as of April 1st. The Administration will not oppose changing the date. The sugar trade has a right to know when it will be called upon to pay this tax."

In view of these statements we believe the trade will be practically 100 percent safe in continuing to build up their stocks in the meantime, or until the proposed law is on the statute books.

We look for a resumption of the rush for tax-free sugars that we have experienced during this month, and strongly
246 recommend the prompt filing of orders for shipment as soon as refiners' facilities will permit.

Refined sugar: Refiners' prices remain unchanged on the basis of 4.80¢ and off shores 4.73¢ ex dock. All orders are for shipment or delivery "soon as possible," and all subject to confirmation.

American Sugar Refining Company today posted the following notice:

"Our notice of March 6th terminated all guarantees in any form, as of close of business today. This includes any business now on our books not already shipped or delivered.

Effective immediately and until further notice, prompt business, specifications with orders, will be considered by us at our 4.80¢ basis price, but with no guarantee in price in any territory. We will not accept any new business on thirty-day contracts in any territory.

In territory where the two, three, and four payment plans have been in effect prior to April 1st, we will, in lieu thereof, offer the two, three, and four deferred payment plans, but with no guar-

antee in price. In territory Chicago and West, where the four payment plan has been in effect prior to April 1st, we will, in lieu thereof, offer the deferred four payment plan, but with no guarantee in price."

Raw sugar: Market opened quiet on Monday. When it became apparent, however, that the pending sugar tax bill could not be passed by April 1st, there was a decided pickup in refiners' interest in first half April arrival raws. It is estimated that sales during the week totaling close to 50,000 tons at 3.45 to 3.55¢. At the close holders are asking 3.60¢ with refiners still interested at 3.55¢.

March 31, 1937.

247 *Exhibit P*

Established 1878. Incorporated 1931. Market Report, Turner Brothers, Sugar Brokers, Incorporated, New York and Philadelphia.

Refined sugar: Unchanged basis 5.00¢ except that in territory Chicago and West, C. & H., American, McCahan, Western and Imperial quote basis 4.80¢.

Withdrawals against contracts are moderate and new business very light, the latter going to second hands at considerably below refiners' lists. The general tone of the market is easy due to the low price of raws. The probability of an excise tax on sugar injects further uncertainty into the situation.

Snow White Porto Rico Granulated is listed at 4.93¢, but is available from second hands at 4.73¢, New York and Philadelphia. Other brands of off-shores are purchasable at 4.60¢ to 4.65¢ f. o. b. New York. While Sucrest Corporation is withdrawn from the market, this brand is available from second hands for prompt and forward delivery at 4.65¢ f. o. b. their refinery, Brooklyn.

Raw sugar: Quiet. No sales reported, buyers and sellers being apart in their views. Last sale was made on February 8th at 3.55¢ duty paid basis. Since then some sugars have been available at that price with refiners' ideas apparently not over 3.50¢. There is a tendency to await new developments in the situation.

The question of an excise tax on sugar is paramount and the market reflects the uncertainty caused by such a pro-
248 posal. Advices from Washington report Administration officials as believing that a sugar tax measure will be presented to Congress within two weeks or so. Majority of opinion is that if Congress passes a tax it will be ½¢ per lb. even though the Secretary of Agriculture originally proposed a tax

of 1¢. The idea of ½¢ a lb. tax is based on the belief that any higher tax would abrogate a present provision in the Cuban Reciprocal Trade Agreement. The thought is advanced in some quarters that while the initial tax might be only ½¢, provision may be made to scale this upward in conjunction with a new agreement with Cuba. The possibility that a tax might not stop at ½¢ causes continued uncertainty in raws and futures. The whole matter of an excise tax is highly conjectural and such a measure will undoubtedly meet opposition in Congress by legislators from beet and cane producing states who have already proposed measures to Congress to increase domestic quotas. Comment has been made that sponsors of such measures will oppose an excise tax unless they are assured of larger domestic quotas. The present status of news leads us to believe that it will be sometime before an excise tax will become effective and that 4.80¢ contracts for refined will be exhausted long before that time.

Early in the week the old (U. S.) contract on the Exchange was steady with trading quiet, but yesterday reports from Washington that tax legislation would be proposed to Congress very shortly and indicating an initial tax of ½¢ per pound with the possibility of a later increase in rate, brought about considerable selling and both yesterday and today the market was under pressure, particularly in the nearest months. Closing prices are at the lows and show declines of from 7 to 4 points in the 1937 positions.

249 Close today; Mch. 255/7, May 258/9, Jul. 260/1, Sept. 260/1, Jan. 255/7.

February 19, 1937.

Exhibit Q

Established 1878. Incorporated 1931. Turner Brothers, Sugar Brokers, Incorporated, Domestic—Sugar Futures—Export, Oscar J. Brucker, Manager Utica Branch, 92 Emerson Avenue, Utica 4-5552.

UTICA, *April 8, '37.*

Dear Mr. Falcone:

Have wire this morning from Turner Bros. advising they can buy for your account 2000 bags of Pearl White sugar in towelling bags, same as your last purchase for $4.77½ FOB New York or New Jersey, wherever the sugar may happen to be. Two weeks delay for picking up; that is, you can take 1000 bags out the week of April 12th starting on Monday and the other 1000 bags can be picked up the week of April 19th. In their telegram this morning, Turner Bros. advised that you take this lot, they believing it was a good purchase. Please advise the writer as

soon as you possibly can if you want us to book this sugar. Of course, it is offered subject to confirmation or prior sale.

Very truly yours,

OSCAR J. BRUCKER,
Oscar J. Brucker,
Phone 4-5552—Utica.

250 *Exhibit LL*

Defendant, Falcone's, Exhibit MM. Page 57 of guest register of Hotel Villa Russo. 57.

AUGUST 15, 1937

Out	Name and	Room No.
Aug. 17	Miss Rose Cuccanse, 612 Albert St., Youngstown, Ohio	37 635
Aug. 17	Miss Donna Cuccanse, 612 Albert St., Youngstown, Ohio	
Aug. 30	Mrs. J. Falcone—children, Joe, Anthony, Mary, 1623 Mohawk Street, Utica, N. Y.	2 8
30	Miss Rose Granziano, 1530 Mohawk Street, Utica, N. Y.	8

AUGUST 21

Aug. 30	Mr. Joseph Falcone, 1623 Mohawk St., Utica, N. Y.	2
	Mr. Joseph Falcone, Jr., 515 Bacon St., Utica, N. Y.	6

251 *Exhibit UU*

Sugar sales invoices of Joseph Falcone

Phone: 2-3613. Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *Mar. 11, 1937.*

Sold to Frank Bonomo & Co. Terms, Credit. Address, 611 Bleecker St.

200 100-lb. bags of sugar @ 5.00, $1,000.00. Receipted by J Bonomo. $1,000.00. No. 1004.

Phone: 2-3613. Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *March 13, 1937.*

Sold to F. Bonomo & Co. Terms Address .

480 Bags Sugar @ 5., $2,400. Receipted by Vincent Bonomo, Jr. $2,400.00. No. 1010.

252 Phone: 2-3613. Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *March 15, 1937.*

Sold to F. Bonomo & Co. Terms Address .

300 Bags 100# Sugar, $1,500. Receipted by J. Bonomo. No. 1012.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bl ɔker St.

UTICA, N. Y., *March 16, 1937.*

Sold to F. Bonomo & Co. Terms Address 611 Bleecker St.

260 Bags Sugar #100 @ 5, $1,300.00. Receipted by F. Bonomo & Co. S. B. $1,300.00. No. 1014.

253 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *March 17, 1937.*

Sold to F. Bonomo & Co. Terms Address .

320 Bags #100 Sugar @ 5, $1,600. Receipted by F. Bonomo & Co. S. Bonomo. No. 1015.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 3, 1937.*

Sold to F. Bonomo & Co. Terms Address .

148 Bags #100 Sugar @ 5.00, $740.00. Receipted by F. Bonomo & Co. S. B. No. 1017.

254 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 10, 1937.*

Sold to F. Bonomo & Co., Inc. Terms Address .

240 Bags 100# Sugar 5.00, $1,200.00. Receipted by F. Bonomo & Co. S. B. No. 1025.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 13, 1937.*

Sold to F. Bonomo & Co., Inc. Terms. Address

240 Bags 100# Sugar 5.00, $1,200.00. Receipted by F. Bonomo & Co. S. B. No. 1025.

255 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 14, 1937.*

Sold to F. Bonomo & Co., Inc. Terms Address .

20 Bags Sugar 100# @ 5.00, $100. Receipted by F. Bonomo & Co. S. B. No. 1026.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 27, 1937.*

Sold to F. Bonomo & Co., Inc. Terms Address, Bleecker St.

360 Bags Sugar 100# @ 5.00, $1,800.00. Receipted by J. Bonomo. No. 1030.

256 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 29, 1937.*

Sold to F. Bonomo & Co., Inc. Terms Address, Bleecker St.

120 Bags Sugar 100# @ 5.00, $600.00. Receipted by J. Bonomo. No. 1031.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *April 30, 1937.*

Sold to F. Bonomo & Co. Terms Address, Bleecker St.

20 Bags Sugar 100# @ 5.00, $100.00. Receipted by S. Bonomo. No. 1033.

257 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *July 2, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address .

220 Bags Sugar @ 4.85, $1,067. Receipted by J. Bonomo. No. 1038.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *July 2, 1937.*

Sold to F. Bonomo & Co. Terms . Address .

180 Bags Sugar @ 4.85, $873. Receipted by J. Bonomo. No. 1037.

258 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *July 3, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address .

360 Bags Sugar @ 4.85, $1,746. Receipted by J. Bonomo. No. 1039.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *July 7, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address .

240 Bags Sugar @ 4.85, $1,164. Receipted by J. Bonomo, Jr. No. 1040.

259 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *Sept. 11, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address, Bleecker St.

140 Bags Sugar, 240 Bags Sugar—380 Bags Sugar @ 5.35, $2,033. Receipted by S. Bonomo. No. 1041.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *Sept. 14, 1837.*

Sold to F. Bonomo & Co., Inc. Terms . Address, Bleecker St.

359 Bags Sugar, 260 Bags Sugar—619 Bags Sugars @ 5.35, $3,311.65. Receipted by S. Bonomo. No. 1042.

260 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *Sept. 15, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address, Bleecker St.

200 Bags Sugar, 250 Bags Sugar, 210 Bags Sugar—660 Bags Sugar @ 5.35, $3,531.00. Receipted by S. Bonomo. No. 1043.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y., *Sept. 17, 1937.*

Sold to F. Bonomo & Co., Inc. Terms . Address, 611 Bleecker St.

240 Bags Sugar, 100 Bags Sugar—340 Bags Sugar @ 5.35, $1,819. Receipted by S. Bonomo. No. 1044.

261 *Exhibit UU–1*

Sugar sales invoices of Alberico & Funicello

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 14, 1937.*

Sold to Alberico & Funicello. Terms . Address .

200 Bags Sugar 100# @ 5.00, $1,000. Receipted by H. Alberico. No. 1027.

Phone: 2–3613. Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 15, 1937.*

Sold to Alberico & Funicello. Terms . Address. .

180 Bags Sugar 100# @ 5.00, $900.00. Receipted by Alberico & Funicello. Per C. M. Funicello. No. 1028.

262 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 16, 1937.*

Sold to Alberico & Funicello. Terms . Address. .

120 Bags 100# Sugar @ 5.00, $600.00, Receipted by H. Alberico. No. 1029.

Phone: 2–3613. Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 29, 1937*

Sold to Alberico & Funicello. Terms . Address, Bleecker St.

100 Bags Sugar 100# @ 5.00, $500. Receipted by H. Alberico. No. 1032.

263 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 30, 1937.*

Sold to Alberico & Funicello. Terms . Address, Bleecker St.

200 Bags Sugar 100# @ $5.00, $1,000. Receipted by Alberico & Funicello. F. C. A. No. 1034.

Exhibit UU–2

Sugar sales invoices of Pauline Aiello

Phone 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *March 10, 1937.*

Sold to Pauline Aiello. Terms . Address, 743 Elizabeth St.

232 Bags Sucrest Sugar 100# @ 5, $1,160.00. Receipted by C. M. A. No. 1003.

264 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *Mar. 12, 1937.*

Sold to Pauline Aiello. Terms . Address, 743 Elizabeth St.

240 Bags Sugar 100# @ 5.00, $1,200.00. Receipted by C. M. A. $1,200. No. 1005.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *March 13, 1937.*

Sold to Pauline Aiello. Terms . Address, 743 Eliz.

368 Bags Sugar @ 5, $1,840. Receipted by Aiello. $1,840. No. 1011.

265 Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *March 17, 1937.*

Sold to Pauline Aiello. Terms . Address .

200 Bags #100 Sugar @ 5, $1,000. Receipted by C. M. A. No. 1016.

Phone: 2–3613, Joseph Falcone, Importer & Wholesale Grocer, 556 Bleecker St.

UTICA, N. Y. *April 3, 193*

Sold to Pauline Aiello. Terms . Address .
130 Bags #100 Sugar @ 5.00, $650.00. Receipted by C. M
No. 1018.
266 Phone: 2–3613. Joseph Falcone, Importer & Whole
Grocer, 556 Bleecker St.

UTICA, N. Y. *April 4, 193*

Sold to Pauline Aiello. Terms . Address .
205 Bags 100# Sugar @ $5.00, $1,025.00. Receipted
C. M. A. No. 1019.
Phone: 2–3613, Joseph Falcone, Importer & Wholesale Gr
556 Bleecker St.

UTICA, N. Y. *April 5, 193*

Sold to Pauline Aiello. Terms . Address .
217 Bags 100# Sugar @ 5.00, $1,085.00. Receipted by C. M
No. 1020.
267 Phone: 2–3613, Joseph Falcone, Importer & Whole
Grocer, 556 Bleecker St.

UTICA, N. Y., *April 6, 193*

Sold to Pauline Aiello. Terms . Address .
300 Bags 100# Sugar @ 5.00, 1500. Receipted by C. M
No. 1021.
Phone: 2–3613, Joseph Falcone, Importer & Wholesale Gr
556 Bleecker St.

UTICA, N. Y., *April 30, 193*

Sold to Pauline Aiello. Terms . Address .
80 Bags Sugar 100# @ 5.00, 400. Receipted by P. Ai
No. 1035.
268 Phone: 2–3613, Joseph Falcone, Importer & Whole
Grocer, 556 Bleecker St.

UTICA, N. Y., *May 4, 193*

Sold to P. Aiello. Terms . Address .
120 Bags 100# Sugar @ 5.00, 600.00. Receipted by C
Aiello. No. 1036.

269 *Exhibit VV*

Sheet No. , Terms , Rating , Credit Limit , Account No. , Name, Pauline Aiello, Address, 743 Elizabeth Street, City .

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
1937								1937
Mar. 10	232 B 5	1003	1,160—		1,000—	c1		Mar. 17
12	240 B 5	1005	1,200—		1,000—	1		19
13	368 B 5	1011	1,840—		2,000—	1		26
17	200 B 5	1016	1,000—	4,260—	1,200—	2		Apr. 3
Apr. 3	130 B 5	1018	650—	3,175—	1,085—	2		8
4	205 B 5	1019	1,025—	2,525—	650—	2		12
5	217 B 5	1020	1,085—	1,500—	1,025—	2		16
6	300 B 5	1021	1,505—		1,200—	4		July 13
29	80 B 5	1035	400—	1,900—	700—	4		23
May 4	120 B 5	1036	600—	290—	310—	4		31
					290—	5		Sept. 9

270 *Exhibit WW*

Sheet No. , Terms , Rating , Credit Limit , Account No. , Name, Alberico &Funicello, Address, 776 Bleecker St., City .

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
1937								1937
Apr. 14	200 Bags 5	1027	1,000—	1,000—	1,500.00	c2		Apr. 24
15	180 Bags 5	1028	900—		1,000—	3		May 11
16	120 Bags 5	1029	600—		1,500—	3		22
29	100 Bags 5	1032	500—					
30	200 Bags 5	1034	1,000—					

271 In District Court of the United States—Northern District of New York

[Title omitted.]

Notice of appeal on behalf of Salvatore Falcone

Name and address of appellant, Salvatore Falcone: 515 Bacon Street, Utica, New York.

Name and address and appellant's attorney: Ransom H. Gillett, D. & H. Building, Albany, N. Y.

Offense: Violation of Section 37 of the Criminal Code of the United States (18 U. S. C. A., section 88), conspiring to commit offenses against the United States, namely, violations of section 1155f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated.

Date of Judgment: June 27, 1939.

Brief description of Judgment and Sentence: To be confined in any institution designated by the Attorney General for a period of one year and five months and to pay a fine of six thousand dollars and to stand committed until fine be paid.

Name of prison where now confined, if not on bail:

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned on the grounds set forth below.

Dated, June 27, 1939.

SALVATORE FALCONE,
Appellant.

272 Grounds of Appeal:

1. The Court erred in denying the motion of the defendant made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case.

2. The Court erred in denying the motion of the defendant, made at the close of all of the evidence, to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury.

3. The Court erred in refusing to charge the jury as requested by the defendant in his written requests to charge numbered as follows:

Fourth. The jury may find an inference only from a fact.

Fifth. The jury may not build an inference upon an inference.

Sixth. There is no evidence that Salvatore Falcone was a partner with Joseph Falcone in the business of buying or selling sugar in the year 1937.

Seventh. The jury may not infer that Salvatore Falcone was in partnership with Joseph Falcone in the buying and selling of sugar in the year 1937, and from that inference infer that the sugar was used for an unlawful purpose.

Eighth. There is no evidence that the defendant Salvatore Falcone conspired with any person during the times charged in the indictment to violate a law of the United States.

Thirteenth. The defendant is not obligated to prove an alibi beyond a reasonable doubt.

273 Fourteenth. If the defendant's proof as to an alibi taken into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty.

Seventeenth. A reasonable doubt may arise from the evidence.

Eighteenth. A reasonable doubt may arise from lack of evidence.

Nineteenth. A reasonable doubt may arise from the character of the evidence.

Twentieth. A reasonable doubt may arise from the character of the witnesses.

Twenty-first. The indictment in this case charges only one conspiracy.

Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty.

Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth. Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth. To establish guilt, there must be willful and knowing participation.

Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

274 4. The Court erred in denying the motion made at the close of the Government's case to strike out evidence concerning stills, papers, writings, photographs, and automobiles not connected in any *may* to any of the defendants.

5. The Court erred in denying the motion of the defendant made before trial for a bill of particulars of the indictment.

In District Court of the United States—Northern District of New York

[Title omitted.]

Notice of appeal on behalf of Joseph Falcone

Name and address of appellant, Joseph Falcone: 1623 Mohawk Street, Utica, New York.

Name and address and appellant's attorney: Ransom H. Gillett, D. & H. Building, Albany, N .Y.

Offense: Violation of Section 37 of the Criminal Code of the United States (18 U. S. C. A., section 88), conspiring to commit offenses against the United States, namely, violation of sections 1155f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated.

Date of Judgment: June 27, 1939.

Brief description of Judgment or Sentence: To be confined in any institution designated by the Attorney General for a
275 period of two years and to pay a fine of seven thousand five hundred dollars and to stand committed until fine is paid.

Name of prison where now confined, if not on bail:

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned on the grounds set forth below.

Dated June 27, 1939.

JOSEPH FALCONE,
Appellant.

Grounds of Appeal:

1. The Court erred in denying the motion of the defendant made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case.

2. The Court erred in denying the motion of the defendant, made at the close of all of the evidence, to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury.

3. The Court erred in refusing to charge the jury as requested by the defendant in his written requests to charge numbered as follows:

Fourth. The jury may find an inference only from a fact.

Fifth. The jury may not build an inference upon an inference.

Sixth. There is no evidence that Joseph Falcone sold or diverted any sugar for any unlawful purpose.

Seventh. There is no evidence that Joseph Falcone sold or diverted any sugar for use in any operation of a still.

276 Eighth. There is no evidence that the defendant, Joseph Falcone, conspired with any person during the times charged in the indictment to violate a law of the United States.

Thirteenth. The defendant is not obligated to prove an alibi beyond a reasonable doubt.

Seventeenth. A reasonable doubt may arise from the evidence.

Eighteenth. A reasonable doubt may arise from lack of evidence.

Nineteenth. A reasonable doubt may arise from the character of the evidence.

Twentieth. A reasonable doubt may arise from the character of the witnesses.

Twenty-first. The indictment in this case charges only one conspiracy.

Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty.

Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth. Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth. To establish guilt, there must be willful and knowing participation.

Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

277 4. The Court erred in denying the motion made at the close of the Government's case to strike out evidence concerning stills, papers, writings, photographs and automobiles not connected in any way to any of the defendants.

5. The Court erred in denying the motion of the defendant made before trial for a bill of particulars of the indictment.

In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Notice of appeal on behalf of Henry Alberico

Name and Address of Appellant: Henry Alberico, 776 Bleecker Street, Utica, New York.

Name and Address of Appellant's Attorney: Jack J. Danella, Paul Building, 219 Elizabeth St., Utica, New York. Roger O. Baldwin, of counsel, 210 State Tower Building, Syracuse, N. Y.

Offense: Violation of Section 37 of the Criminal Code of the United States (18 U. S. C. A., Section 88) conspiring to commit offenses against the United States, namely violations of Sections 1155 f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated.

Date of Judgment, June 27, 1939.

278 Brief description of judgment or sentence: To be confined in any institution designated by the Attorney-General of the United States for a period of one year and one day, and to pay a fine of $3,000.00 and to stand committed until the fine be paid.

Name of prison where now confined, if not on bail: At the present time, defendant is in the custody of the United States marshall in and for the Northern District of New York at the Federal Building in the City of Syracuse, New York, and is to be transferred to the Oneida County Jail in the City of Utica, County of Oneida and State of New York.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of the sentence pending appeal.

Dated June 27th, 1939.

HENRY ALBERICO,
Appellant.

Grounds of Appeal:

1. The Court erred in denying the motion of the defendant made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case.

2. The Court erred in denying the motion of the defendant made at the close of all of the evidence, to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury.

279 3. The Court erred in refusing to permit the witness, Giuseppe Traversa, an employee of the defendant, to testify as to the sales of five gallon cans and sugar to various customers of the defendant.

4. The Court erred in denying the motion made at the close of the Government's case to strike out evidence concerning stills, papers, writing, photographs, and automobiles not connected in any way to any of the defendants.

5. The Court erred in allowing in evidence the conversations between the defendants George Blake and Salvatore Morreale which conversations were not had in the presence of the defendant but were hearsay as to him, and no part of the conspiracy alleged.

280 In United States District Court—For the Northern District of New York

[Title omitted.]

Notice of appeal on behalf of Henry Alberico et al.

Name and address of appellants: Lawrence Grimaldi, 1112 Rutger St., Utica, N. Y.; Nicholas Nole, 713 South St., Utica,

N. Y.; Salvatore A. Graniero, 632 Rosemont Place, Utica, N. Y.; John Nole, 215 Kossuth Ave., Utica, N. Y.; Frank Soldano, 1017 Smith Place, Utica, N. Y.; Frank J. Milozzo, 309 Third Ave., Utica, N. Y.

Name and Address of Appellants' Attorney: Irving K. Baxter, 215 Rutger St., Utica, N. Y.

Offense, Conspiracy, Section 37 of the Criminal Code of the United States.

281 Date of judgment, June 27, 1939.

Brief description of judgment or sentence, the jury having rendered a verdict of guilty against all of the above named defendants, the Court pronounced judgment or sentence as follows:

Lawrence Grimaldi, Sentence, One year and Eight months in any institution to be designated by the Attorney General of the United States.

Salvatore A. Graniero, Sentence, Two Years in any institution to be designated by the Attorney General of the United States.

Nicholas Nole, Sentence, Two Years in any institution to be designated by the Attorney General of the United States.

John Nole, Sentence, One Year and Five months in any institution to be designated by the Attorney General of the United States.

Frank Soldano, Sentence, One Year and Four months in any institution to be designated by the Attorney General of the United States.

Frank J. Milozzo, Sentence, One Year and Three months in any institution to be designated by the Attorney General of the United States.

Name of prison where now confined, if not on bail:

The defendants were taken in custody by the U. S. Marshall and are temporarily confined in the Oneida and Madison County Jails.

282 I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

Dated, June 27, 1939.

(Signed) LAWRENCE GRIMALDI,
Appellant.
SALVATORE A. GRANIERO,
NICHOLAS NOLE,
JOHN NOLE,
FRANK SOLDANO,
FRANK J. MILOZZO.

Grounds of Appeal:

The trial Court erroneously over-ruled demur'er to the indictment, and erred in refusing the demand for a bill of particulars, and in denying motion to quash the indictment; because the indictment was vague and indefinite, improperly combined many different alleged offences and defendants, and was too general in its allegations.

The trial Court erred in denying motions for a mis-trial on the ground that the jury was informed that some of the defendants had pleaded guilty to the indictment, and one defendant was brought before the Court during the trial and in the presence and hearing of the jury changed his plea to guilty; because said information and proceeding tended greatly to prejudice the jury and to prevent defendants from getting a fair trial.

The trial Court erred in permitting use of evidence unlawfully obtained by use of an invalid and void search warrent, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

283 The trial Court erred in over-ruling motions to discharge defendants on ground there was insufficient evidence and no legal evidence upon which a verdict of guilty might properly be founded.

The evidence adduced to prove conspiracy was entirely circumstantial and was entirely consistent with the hypothesis of innocence.

The trial Court erred in denying motions to set aside the verdict and for a new trial, upon all the motions, objections, and exceptions of defendants.

The trial Co'rt erred in charging the jury in substance, that if the facts and circumstances lead to belief that some of the defendants had planned, or scheemed, or connived to defraud the United States of taxes, that that would prove the conspiracy as charged in the indictment; and that each defendant who knew of the plan or scheeme and who did anything to further it was guilty as charged; because, unless the defendants deliberately agreed to aid in carrying out the plan or scheeme to defraud the U. S. and one of them did something to effect the object of the conspiracy, there could be no criminal conspiracy.

The trial Court erred in charging the jury in substance, that they could determine whether all those stills were connected, by considering their similarity as to construction or appearance; and, if they so found, conspiracy would be proven that all those stills were operated by a general plan.

284 In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Notice of application for bail for Salvatore Falcone

SIR: Take notice that upon the petition of Salvatore Falcone, verified the 29th day of June, 1939 and the papers annexed thereto with copies of which you are hereby served and upon all the papers and proceedings herein, an application will be made to a Judge of the United States Court of Appeals for the Second Circuit at the court room of said Court in the Federal Building, Foley Square, in the City of New York, New York, on the 5th day of July, 1939 at four (4) o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order admitting the defendant-appellant Salvatore Falcone to bail during the pendency of the Appeal herein, and for such other and further relief as to the Judge hearing the application shall seem just and proper.

Dated June 29, 1939.

Yours, etc.,

D. & H. Building,

RANSOM H. GILLETT,
Attorney for Appellant,
Office and Post Office Address, Albany, New York.

285 To: Ralph L. Emmons, U. S. District Attorney in and for the Northern District of New York, Federal Building, Syracuse, New York.

In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Petition of Salvatore Falcone for bail

To the United States Circuit Court of Appeals for the Second Circuit, or if the Court is not in session, to a Judge thereof.

Salvatore Falcone, one of the defendants above-named respectfully petitions and shows.

First. That he is a citizen of the United States and a resident of the City of Utica in the State and Northern District of New York.

Second. That at a term of the United States District Court for the Northern District of New York held at Auburn, New

York in October, 1938 an indictment was returned by the Grand Jury charging this defendant and sixty-seven other persons with the crime of conspiracy. The indictment charged a viola-
286 tion of Section 37 of the Criminal Code of the United States, (18 U. S. C. A., section 88) and alleged that the conspiracy was to commit offenses against the United States, namely violations of Section 1155f, g and h, 1162, 1184, 1185, 1287, 1441 and 1158a of Title 26, United States Code Annotated. It charged a number of overt acts by various defendants mainly the operation of illegal stills. It charged no overt act on the part of this defendant. A copy of the indictment is hereto annexed.

Third. Your petitioner was arraigned on said indictment and pleaded not guilty. He thereafter moved the Court for a bill of particulars to enable him to prepare his defense. The motion was denied.

A trial of the indictment was had in the United States District Court for the Northern District of New York held at the City of Syracuse, New York before Honorable Frederick H. Bryant, United States District Judge, and a jury beginning on the 10th day of May, 1939 and terminating on the 17th day of June, 1939. The jury on June 17, 1939 returned a verdict of guilty against your petitioner. On June 27, 1939 your petitioner was sentenced by the Uited States District for the Northern District of New York to be confined in any institution designated by the Attorney General for a period of one year and five months and to pay a fine of Six Thousand Dollars and to stand committed until the fine be paid.

Fourth. On June 27, 1939 your petitioner in compliance with the rules in such case made and provided, duly filed with the clerk of the United States District Court for the Northern District of New York duplicate notices of appeal from the judg-
ment of conviction and duly caused to be served a copy of
287 the notice of appeal upon the United States Attorney for the Northern District of New York. Your petitioner thereupon made application to Hon. Frederick H. Bryant, United States District Judge for the Northern District of New York, he being the sentencing Judge, that he be admitted to bail pending the appeal. The appplication for bail was denied. Your petitioner is now confined in the Oneida County Jail at the City of Utica, New York.

Fifth. Your petitioner will be seriously aggrieved if he is obliged to be incarcerated pending this appeal and unless he is admitted to bail pending the appeal. The appeal is taken in good faith and involves substantial questions which should be determined by the appellate court. These questions are raised by

the contentions of your petitioner upon the appeal hereinafter enumerated and the salient points thereof summarized.

1. That the Court erred in denying the motion of your petitioner made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case, and that it again erred in denying the motion of your petitioner made at the close of all the evidence to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury, and in denying the motion of your petitioner for a directed verdict of acquittal made on the same grounds.

The trial of this indictment occupied nearly six weeks of the Court's time. During the trial the Government offered proof of the existence of twenty-two stills in an area covering the City of Utica and places within about thirty miles thereof.
288 There was *was* not one word of testimony or one bit of evidence connecting your petitioner with any of the stills. Your petitioner's name was not mentioned in the record until near the very end of the trial when evidence naming him was produced substantially as follows: On Bleecker Street in the City of Utica is a business establishment known as the Venetian Cafe. By the evidence it was shown to be not a saloon or place where alcoholic beverages are sold, but a pastry, icecream and coffee shop. The Government contended by evidence that several of the defendants were seen at times in the Venetian Cafe. The Government swore one of the proprietors of the Venetian Cafe. He was asked if your petitioner ever was at that place to his knowledge. He replied that on one occasion your petitioner came to solicit funds for the American Red Cross and on another to solicit a contribution toward the erection of a monument to Marconi. An investigator for the Alcohol Tax Unit testified that he saw your petitioner in the City of Utica at these times and under these circumstances:

(a) He said that on June 11, 1937, at 4:40 P. M. at Bleecker and Third Streets in the City of Utica, New York, he saw your petitioner talking with Lawrence Grimaldi. Grimaldi was a defendant named in the indictment. His wife and your petitioner's wife are sisters. It was not claimed that this conversation involved any criminal or unlawful act.

(b) The witness testified that on October 17, 1937 at 9:55 A. M. he saw your petitioner driving a car in the City of Utica and stop in front of No. 718 Lansing Street and enter
289 these premises. That is the dwelling house of John Melito, another defendant. The witness said that a few minutes later a man named Sam Grio entered the house. Sam Grio is

not a defendant. He is one of the proprietors of the Venetian Cafe. No criminal act on his part was testified to at the trial. The witness said that ten minutes later your petitioner's brother, Joseph Falcone, who is also a defendant, entered the premises. On cross-examination this same witness denied that he saw your petitioner on October 17, 1937. No criminal act or unlawful act was testified to as having been committed by your petitioner on this occasion.

(c) The witness testified that on November 29, 1937, at 9:04 P. M., he saw your petitioner meet Sam Grio above-mentioned and talk to him about five minutes. There was no evidence of any wrong doing by your petitioner on this occasion. Your petitioner offered evidence by a dentist, resident and practicing, in the City of Buffalo, New York, and by the records of the dentist that on November 29, 1937, at about 7:30 in the evening the dentist extracted a tooth from your petitioner at his office in the City of Buffalo, New York. This evidence becomes important in view of one of the denials of your petitioner's requests to charge hereinafter set forth.

Other evidence mentioning your petitioner was that in the year 1936 your petitioner gave to his brother, Joseph Falcone, a power of attorney to sign checks drawn upon your petitioner's bank account and that in March, 1937 your petitioner's said brother, Joseph Falcone, gave to your petitioner a power of attorney to sign checks drawn upon his bank account.

290 Your petitioner's brother, Joseph Falcone, also a defendant, between March 1, 1937 and September 14, 1937, purchased at various intervals through Turner Brothers, Sugar Brokers, having an office at 120 Wall Street, New York City, 8600 bags of sugar each containing 100 pounds. There was no evidence that the said Joseph Falcone or your petitioner ever diverted any of that sugar to an unlawful purpose. On the contrary the Government offered in evidence one ledger sheet of the business of Joseph Falcone showing the sale of 5707 of said bags of sugar to Frank Bonomo & Co., Wholesale Grocers, in the City of Utica, New York. The said Joseph Falcone by two others of his ledger sheets received in evidence showed the sale of the balance of said sugar, 800 bags to Alberico & Funnicello, Wholesale Grocers of Utica, New York, 2092 bags to Pauline Aiello, doing business as D. Aiello & Company, Wholesale Grocer in the City of Utica, New York, and one bag thereof by the testimony of the truckman who transported it being lost in transit.

Checks were introduced in evidence showing that under the power of attorney from this petitioner's brother, your petitioner

drew on the bank account of his brother two checks in payment for part of the sugar.

It was also in evidence by a cancelled check that your petitioner's brother under his power of attorney drew on your petitioner's bank account a loan to himself of Five Thousand Dollars.

The foregoing is the sum and substance of the case presented by the Government against your petitioner. Yet
291 the Trial Court at the close of the Government's case denied the motion made in behalf of your petitioner for dismissal and again at the close of all of the evidence denied a motion for dismissal and for direction of a verdict of an acquit'al. Your petitioner submits that there was absolutely no evidence to justify the sending of his case to a jury.

Mention was made by the Assistant United States Attorney during the trial and in his summation that your petitioner and the defendant, Lawrence Grimaldi, were married to sisters and that your petitioner's son, a practicing lawyer in the City of Utica, New York, is married to a daughter of Pauline Aiello. It developed in trial as has been pointed out that Pauline Aiello who is in the wholesale grocery business purchased sugar from your petitioner's brother. There was also evidence that she is the owner of a building in the City of Utica which she had leased to a tenant and where a still was found. No claim was made that Mrs. Aiello was cognizant of the operation of a still or had any connection with it. Your deponent submits that he is not responsible for the marriage relationship of his son or of his wife's sister and that no inference of guilt or of any wrongdoing should or could be drawn from those facts.

2. At a number of stills about which evidence, oral and by photographic exhibits, was given, no persons were found and no connection to any of the defendants were shown, surely not to this petitioner. A motion was made by counsel for one of the defendant's at the close of all of the evidence to strike out the evidence concerning those stills. The Court denied the
292 motion and permitted the jury to consider them in reaching a verdict. This motion was not repeated in behalf of your petitioner individually for the reason that by stipulation on the record in open court it was agreed that an exception to any ruling of the Trial Court on the motion of any defendant should inure to the benefit of all defendants.

3. By direction of the Trial Court your petitioner before the charge to the jury submitted typewritten requests to charge. The following numbered as they are in the written requests the Court refused to charge.

"First. That the evidence in reference to the defendant, Salvatore Falcone, is circumstantial evidence."

"Second. That in a case of circumstantial evidence, unless the evidence excludes to a moral certainty every reasonable hypothesis except that of guilt, the verdict of the jury must be not guilty."

"Fourth. The jury may find an inference only from a fact."

"Fifth. The jury may not build an inference upon an inference."

"Sixth. There is no evidence that Salvatore Falcone was a partner with Joseph Falcone in the business of buying or selling sugar in the year 1937."

"Seventh. The jury may not infer that Salvator Falcone was in partnership with Joseph Falcone in the buying and selling of sugar in the year 1937, and from that inference infer that the sugar was used for an unlawful purpose."

"Eighth. There is no evidence that the defendant Salvatore Falcone conspired with any person during the times charged in the indictment to violate a law of the United States."

293 "Thirteenth. The defendant is not obligated to prove an alibi beyond a reasonable doubt."

"Fourteenth. If the defendant's proof as to an alibi taken in consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty."

"Seventeenth. A reasonable doubt may arise from the evidence."

"Eighteenth. A reasonable doubt may arise from lack of evidence."

"Nineteenth. A reasonable doubt may arise from the character of the evidence."

"Twentieth. A reasonable doubt may arise from the character of the witness."

"Twenty-first. The indictment in this case charges only one conspiracy."

"Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies."

"Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty."

"Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts."

"Twenty-fifth. Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt."

"Twenty-sixth. To establish guilt, there must be willful and knowing participation."

294 "Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty."

Your petitioner submits that the refusal of the Trial Court to charge as requested constitutes reversible error.

Sixth. Your petitioner therefore shows that he intends to prosecute this appeal, that it is made in good faith, that substantial questions are involved which should be determined by the appellate court, and that in the interest of justice, he should not be incarcerated during the time for the preparation of the appeal and its presentation and decision.

Seventh. No other or previous application for the relief herein prayed for has been made to any Court or Judge except as here. inabove set forth.

Wherefore, your petitioner prays that an order may be made that pending the appeal, he be admitted to bail.

Dated, June 29, 1939.

SALVATORE FALCONE,
Petitioner.

Duly sworn to by Salvatore Falcone. Jurat omitted in printing.

295 In United States Court of Appeals—Second Circuit

[Title omitted.]

Answering affidavit of David D. Joselit

To the United States Circuit Court for the Second Circuit (or a Judge thereof, if not in session):

STATE OF NEW YORK,
Northern District of New York, County of Onondaga, ss:

1. David D. Joselit, being duly sworn, deposes and says: that he is an Assistant United States Attorney in and for the Northern District of New York; that he was assigned to and had charge of the prosecution of the above entitled criminal proceeding and was trial counsel for the Government therein; that at a stated term of the United States District Court for said District, held in the City of Auburn, New York, in the month of October

296 1938, an indictment was return by the Grand Jury and filed with the Court, charging the above named petitioner and others therein named with the crime of conspiracy (violation of Section 37 of the Criminal Code of the United States) (Title 18, U. S. C. A., Section 88); that such indictment alleged that

the above named petitioner and others conspired to commit various offenses against the United States, namely: violations of Sections 1155 (f), (g), and (h), 1162, 1184, 1185, 1287, 1441, and 1158 (a) of Title 26, United States Code Annotated (a copy of said indictment is hereto annexed); that said indictment charged twenty-five specific overt acts committed by various defendants therein design'ted between on or about March 1, 1933 and October 5, 1938; that said indictment further set forth numerous objects and purposes of the conspiracy, thereby fully and comprehensively informing the above defendant and the other defendants therein named of the charges contained in said indictment.

2. That previous to the trial this petitioner made a motion before Honorable Frederick H. Bryant, United States District Judge for the Northern District of New York, for a Bill of Particulars and such application and motion was denied.

3. That the above indictment was moved for trial before said Court and a jury upon due notice; that said trial commenced May 10, 1939, and continued up to and including June 17, 1939, when the jury returned a verdict of guilty as charged against this petitioner and twenty other defendants, and acquitted three defendants; that after such verdict this petitioner made application for, and the Trial Judge granted, a postponement of the imposition of sentence until June 27, 1939; that thereafter, and on the said 27th day of June 1939 this petitioner made a motion
297 to set aside the verdict upon the customary grounds and such motion was denied by said Honorable Court; that the above sentence was pronounced on the above named petitioner on June 27, 1939, by said Trial Judge and such sentence was that he be confined in any institution to be designated by the Attorney General for a period of one year and five months and to pay a fine of six thousand dollars and to stand committed until paid.

4. That on the said 27th day of June 1939 the above named petitioner filed a notice of appeal with the Clerk of the United States District Court for the Northern District of New York and served a copy thereof upon the United States Attorney for said District; that said notice of appeal does not contain a notice that the petitioner elects not to enter upon the service of his sentence pending appeal from the judgment of conviction rendered herein and upon the sentence imposed as aforesaid, pursuant to Rule V of the Rules of the Supreme Court in criminal cases; that said petitioner made applications to said Trial Judge on June 27, 1939, that he be admitted to bail pending the appeal; that such application was denied and disallowed by the Honorable Frederick H. Bryant.

5. That your deponent respectfully submits that bail should not be allowed pending such appeal, as the appeal does not involve

any substantial question or questions which should be determined by the Appellate Court; that there is no merit to the appeal and that the same is not prosecuted in good faith; that the trial of the issues of fact was conducted by said Trial Judge for a period of about six weeks in a fair, impartial and just manner, without any material or substantial errors of law whereby this petitioner was prejudiced or his rights impaired; that he was
298 represented upon such trial by able and experienced trial counsel, namely: Daniel H. Prior, Esquire, of Albany, New York, and petitioner's son, Anthony S. Falcone, Esquire, of Utica, New York.

6. That the evidence adduced by the Government established a prima facie case against this petitioner and twenty-three other defendants; that about one hundred and fifty witnesses were sworn on behalf of the Government and more than five hundred documentary exhibits received in evidence, together with numerous physical exhibits, and the proof offered by the Government established, without contradiction on the part of this petitioner or any of the defendants on trial, the existence and operation of twenty-two illicit and illegal distilleries located in the City of Utica and adjoining area within the Northern District of New York; that the evidence clearly showed that this petitioner was one of the heads and a principal conspirator, and that he was one of the financiers and suppliers of a huge amount of sugar which was used by the unlawful syndicate operating stills in violation of the Internal Revenue laws of the United States within the period set forth in the indictment.

7. That the evidence did not show that this petitioner was personally engaged in the operation of the twenty-two stills charged in the indictment, but the proof did establish that this petitioner and his brother, Joseph Falcone, who were partners in many enterprises, made large purchases of sugar, an essential ingredient employed in the distillation of alcohol; that the evidence likewise showed deliveries of sugar amounting in all to eighty-six hundred bags of one hundred pounds each (eight hundred and sixty thousand pounds) to Joseph Falcone, the brother of this petitioner and also a defendant who was convicted
299 upon said trial; that such purchases and deliveries of sugar occurred while the stills were in operation in Utica and its environs during a period of seven months in the year 1937; that during the period of such purchases eight stills in operation, and which are charged in the indictment, were raided and seized by Federal officers and State and local police; that evidence introduced by the Government upon the trial established that sugar of the same brand (Sucrest) purchased by the Falcone Brothers, Joseph and Salvatore Falcone, was seized in stills; that evidence

was introduced by the Government that Sucrest sugar bags, containing certain dating symbols imprinted or stenciled thereon, were found in stills, and evidence was likewise introduced by the Government showing that Sucrest sugar was delivered to one of the three Falcone "drops" (F. Bonomo & Company), and that such sugar bags, containing the same dating symbols, were discovered by the raiding officers in several of the stills raided during said period and charged in the indictment.

8. That proof of certified and other checks and documentary evidence showing payment for such sugar, or a part thereof, was introduced by the Government; that such checks and documents were signed by this petitioner, containing a legend or memorandum thereon, "1000 bags of sugar," thereby showing knowledge on his part of the transactions involving the large purchase of sugar; that evidence was introduced by the Government showing the purchase by this petitioner of a cashier's check of a Utica bank, which check was payable to sugar brokers or refiners; that testimony was offered by the petitioner in his defense that he and his said brother employed a bookkeeper, Palma Mercu-
300 rio; that such bookkeeper, as a defense witness, under cross-examination testified that the Falcone Brothers did not deal in sugar during any year except the year 1937, although she had been employed as bookkeeper by such brothers for seven years; that such defense witness likewise testified that Joseph and Salvatore Falcone, the petitioner herein, were partners in many business enterprises.

9. That independently of the foregoing evidence, the Government introduced proof of association on the part of the petitioner and other defendants charged in the indictment and tried and convicted in the same trial; that in an effort to contradict such association evidence this petitioner offered proof of an alibi; that such alibi was offered by a Buffalo dentist that on a specific date, November 29, 1937, when a Government witness testified he saw this petitioner in Utica, this defendant claimed he was in Buffalo (about two hundred miles distant) undergoing treatment in a dentist's office; that such dentist's records and his testimony as a defense witness were before the jury.

10. That the Court properly denied motions made on behalf of this petitioner to strike out evidence concerning illicit stills charged in the indictment and proven on the trial; that the Government offered evidence showing that large quantities of sugar were found in various stills during said period and among the sugar or empty sugar bags so found was sugar purchased by this petitioner and his partner brother, Joseph Falcone.

11. That the Trial Judge carefully and properly covered in his charge to the jury all pertinent questions and principles of

law properly applicable to the trial of said case and to the evidence adduced therein; that the requests to charge enumerated in petitioner's moving papers herein and submitted by his counsel to the Trial Judge in advance of such charge were im-
301 proper and unwarranted requests as a matter of law and, therefore, the Trial Judge properly denied the same, except wherein such requests were covered by the Court's general charge; that such questions of law raised by the moving papers herein do not involve any substantial question which should be determined by the Appellate Court in the application for bail pending appeal.

12. That deponent respectfully submits that the moving papers herein do not make out a case for the relief sought within Rule VI of the Rules in criminal cases promulgated by an order of the Supreme Court of the United States on May 7, 1934, pursuant to the provisions of the Act of Congress approved March 8, 1934, entitled, "An Act to give the Supreme Court of the United States Authority to Prescribe Rules of Practice and Procedure with Respect to Proceedings in Criminal Cases after Verdict." (Act of February 24, 1933, c. 119 U. S. C. Title 28, Section 723a.)

That the application of the petitioner, Salvatore Falcone, the Defendant-Appellant, for bail during the pendency of the appeal should be denied.

DAVID D. JOSELIT,
Assistant United States Attorney,
Northern District of New York.

Subscribed and sworn to before me this 1st day of July 1939.

B. F. TOMPKINS,
Notary Public,
Onondaga County.

302 In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Notice of application for bail for Joseph Falcone

SIR: Take notice that upon the petition of Joseph Falcone, verified the 29th day of June 1939, and the papers annexed thereto with copies of which you are hereby served and upon all the papers and proceedings herein, an application will be made to a Judge of the United States Court of Appeals for the Second Circuit at the court room of said Court in the Federal Building, Foley Square, in the City of New York, New York, on the 5th day of July 1939, at four (4) o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order admitting the defendant-appellant Joseph Falcone to bail

during the pendency of the appeal herein, and for such other and further relief as to the Judge hearing the application shall seem just and proper.

Dated, June 29, 1939.

Yours, etc.,

RANSOM H. GILLETT,
Attorney for Appellant,
Office and Post Office Address,
D. & H. Building, Albany, New York.

303 To:

RALPH L. EMMONS,
U. S. District Attorney in and for the Northern District of New York,
Federal Building, Syracuse, New York.

In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Petition of Joseph Falcone for bail

To the United States Circuit Court of Appeals for the Second Circuit or if the Court is not in session to a judge thereof:

Joseph Falcone, one of the defendants above-named, respectfully petitions and shows:

First. That he is a citizen of the United States and a resident of the City of Utica in the State and Northern District of New York.

Second. That at a term of the United States District Court for the Northern District of New York held at Auburn, New York, in October 1938, an indictment was returned by the Grand Jury charging this defendant and sixty-seven other persons with the crime of conspiracy. The indictment charged a violation of Section 37 of the Criminal Code of the United States
304 (18 U. S. C. A., section 88), and alleged that the conspiracy was to commit offenses against the United States, namely, violations of Sections 1155f, g, and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated. It charged a number of overt acts by various defendants mainly the operation of illegal stills. It charged no overt act on the part of this defendant. A copy of the indictment is hereto annexed.

Third. Your petitioner was arraigned on said indictment and pleaded not guilty. He thereafter moved the Court for a bill of particulars to enable him to prepare his defense. The motion was denied.

A trial of the indictment was had in the United States District Court for the Northern District of New York held at the City of Syracuse, New York, before Honorable Frederick H. Bryant, United States District Judge, and a jury beginning on the 10th day of May 1939, and terminating on the 17th day of June 1939. The jury on June 17, 1939, returned a verdict of guilty against your petitioner. On June 27, 1939, your petitioner was sentenced by the United States District for the Northern District of New York to be confined in any institution designated by the Attorney General for a period of two years and to pay a fine of Seven Thousand Five Hundred Dollars and to stand committted until the fine be paid.

Fourth. On June 27, 1939, your petitioner in compliance with the rules in such case made and provided, duly filed with the clerk of the United States District Court for the Northern District of New York duplicate notices of appeal from the judgment of conviction and duly caused to be served a copy of the notice of appeal upon the United States Attorney for the North-
305 ern District of New York. Your petitioner thereupon made application to Hon. Frederick H. Bryant, United States District Judge for the Northern District of New York, he being the sentencing Judge, that he be admitted to bail pending the appeal. The application for bail was denied. Your petitioner is now confined in the Oneida County Jail at the City of Utica, New York.

Fifth. Your petitioner will be seriously aggrieved if he is obliged to be incarcerated pending this appeal and unless he is admitted to bail pending the appeal. The appeal is taken in good faith and involves substantial questions which should be determined by the appellate court. These questions are raised by the contentions of your petitioner upon the appeal hereinafter enumerated and the salient points thereof summarized.

1. That the Court erred in denying the motion of your petitioner made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case, and that it again erred in denying the motion of your petitioner made at the close of all the evidence to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury, and in denying the motion of your petitioner for a directed verdict of acquittal made on the same grounds.

The trial of this indictment occupied nearly six weeks of the Court's time. During the trial the Government offered proof of the existence of twenty-two stills in an area covering the City

of Utica and places within about thirty miles thereof.
306 There was not one word of testimony or one bit of evidence connecting your petitioner with any of the stills. Your petitioner's name was not mentioned in the record until near the very end of the trial when evidence naming him was produced substantially as follows: That your petitioner during the year 1937 conducted a business as a jobber in sugar. That between the 1st day of March 1937, and the 14th day of September 1937, your petitioner purchased in the open market, through Turner Brothers, Sugar Brokers, of 120 Wall Street, New York City, a total of 8,600 bags of sugar, each of 100 pounds, the purchases being made in various lots during those times. The Government introduced in evidence a ledger sheet of your petitioner showing the sale of 5,707 bags of the sugar to Frank Bonomo & Co., Wholesale Grocers, doing business in the City of Utica, New York. The Government also presented in evidence cancelled checks of Frank Bonomo & Co. showing payment to your petitioner for the sugar. A transcript of the checking account of your petitioner for the year 1937 was produced in evidence showing total deposits for that year by your petitioner of $90,652.19. It also showed that your petitioner discounted notes amounting to $630.28. It also showed that among the discounts was one of a note of $80.00 of which the maker was Lawrence Grimaldi, another defendant. At the time of the trial $30.00 was due upon this *pote*, partial payments of $5.00 and $10.00 having thus reduced it. The transcript exhibit showed that at no time was there on deposit in excess of $13,152.48; that the
checking account varied some times between $5,000 and
307 $6,000, sometimes under $1,000.00 and that the final balance at the end of the year 1937 was $1,930.87. It also showed that in the year 1938 the total deposits of your petitioner were not in excess of $2,500.00.

No attempt was made by the Government and no proof was offered that any of the sugar was diverted by your petitioner to any unlawful purpose.

A prosecution witness, an investigator for the Alcohol Tax Unit, testified that during the year 1937 he made observations of your petitioner in the City of Utica and saw your petitioner under the following circumstances:

(a) He said that on July 20, 1937, at 4:37 P. M. he saw your petitioner go in the Venetian Cafe, a pastry and coffee shop, and a few minutes later he saw your petitioner leave the cafe with two men, unknown to him.

(b) He said that on July 24, 1937, at 10:35 A. M. he saw John Melito, a defendant, go to your petitioner's residence and he saw your petitioner open the door for him. He said that a

few minutes later an unknown man, the man having since been made known to him by the name of Russell Mancusa. There was no connection shown of Mancuso with any fact or person pertinent to this case. He said that a few minutes later he saw a man named Sam Grio enter petitioner's home. No evidence connected Sam Grio with any matter pertinent to the case.

(c) The witness testified that on August 24, 1937, at 7:35 P. M. he saw your petitioner near premises 1017 Ontario Street in the City of Utica. That your petitioner drove his automobile in the driveway adjacent to the premises and talked with said Sam Grio, for twenty minutes and then left.

308 (d) He testified that on September 15, 1937, he saw a truckload of sugar being unloaded at Frank Bonomo & Co.'s wholesale grocery house; that part of the load was being taken in Bonomo's warehouse and part transferred to Bonomo's truck. He said that your petitioner came to the scene, went inside the grocery store, remaining about eight minutes, that your petitioner came out and helped direct the truck driver back the truck in the narrow driveway. He stated that he observed the date symbols on some of the bags of sugar, one was stamped "13I7," another "1/2 9I7." These symbols indicate the date that the bag was packed at the refinery. "13I7" indicates it was packed September 13, 1937, "1/2 9I7" indicates the packing on September 9, 1937. It also appears in the evidence that the brand of sugar is a nationally sold brand, and that every bag packed at the refinery on those days to wherever they were shipped bore identical stamps.

(e) The witness testified that on September 16, 1937, he saw your petitioner driving an automobile in Utica and that your petitioner stopped in front of the Venetian Cafe and a man named Sam Grio came to the curb and talked with your petitioner.

(f) The witness stated that on September 27, 1937, at 7:30 P. M. he saw your petitioner's car parked near Grio's car at Grio's residence. He said he saw your petitioner back his car out of the driveway and drive around the block. He said your petitioner returned and as he approached the driveway extinquished the lights on the car. He said your petitioner then walked toward his car. that he extinguished his lights and drove away.

309 (g) The witness testified that on October 17, 1937, shortly after 10:00 A. M. he saw your petitioner enter the home of John Melito, another defendant.

(h) The witness said that on January 17, 1938, at 7:38 P. M. he saw your petitioner drive an automobile near the Venetian Cafe but that your petitioner did not talk to anyone at that time.

(i) The witness said that on January 21, 1938, at 6:57 P. M. he saw your petitioner enter the Venetian Cafe. He later saw two others of the defendants enter and said he saw your petitioner and the other two talking inside the cafe.

It was shown that part of the sugar purchased and sold by your petitioner was sold to Alberico & Funnicello, Wholesale Grocers, of the City of Utica. Henry Alberico, a member of the firm was a defendant in this case.

(a) An investigator for the Alcohol Tax Unit testified that in the latter part of the month of September 1937, two stills were found and some sugar bags bearing the packing date symbols, "13–I–7" and "1/2 9–I–7."

A witness named Steinberg testified that he resides in Syracuse. That since the repeal of prohibition he has dealt in illicit alcohol; that in the latter part of 1936 he saw your petitioner on a street in Utica; that he asked your petitioner if your petitioner had any alcohol; that your petitioner answered him, "I am not in that business"; that he then took a card from his pocket with a telephone number on it and asked your petitioner if he would call that number; that your petitioner left and went in a furniture store; that later a man came whose name he did not know and sold him alcohol. He was specific in stating that his only mention of alcohol or about its purchase was to ask your petitioner if your petitioner had any alcohol and that your petitioner replied, "I am not in that business."

310

It was on this evidence that the Government rested its case against your petitioner. Your petitioner submits that it failed far short of establishing a prima facie case of the conspiracy alleged in the indictment.

Your petitioner in his defense produced his ledger sheets showing the disposition and sale of sugar purchased and sold by him. He showed that it all was bought and paid for by three wholesale grocers in the City of Utica and he produced the receipted invoices for each delivery. He produced the truckmen who made the deliveries and he produced evidence by a book kept in the course of business of a boarding house at Atlantic City, New Jersey, showing that he was at Atlantic City, New Jersey, with his wife and children on August 24, 1937, when the prosecution witness testified he saw him in Utica, New York. Your petitioner also produced other evidence by witnesses who were also at Atlantic City on that date showing his presence there. This becomes important in view of the denial of your petitioner's request to charge as to the proof of alibi necessary.

Your petitioner submits that the jury was permitted to speculate and to use imaginings rather than evidence in arriving at

its verdict. It is submitted that denial of the motions for a dismissal or for a directed verdict constitutes reversible error.

1. By direction of the Trial Court your petitioner before the charge to the jury submitted typewritten requests to charge. The following numbered as they are in the written requests the Court refused to charge.

"First. That the evidence in reference to the defendant, Joseph Falcone, is circumstantial evidence."

311 "Second. That in a case of circumstantial evidence, unless, the evidence excludes to a moral certainty every reasonable hypothesis except that of guilt, the verdict of the jury must be not guilty."

"Fourth. The jury may find an inference only from a fact."

"Fifth. The jury may not build an inference upon an inference."

"Sixth. There is no evidence that Joseph Falcone sold or diverted any sugar for any unlawful purpose."

"Seventh. There is no evidence that Joseph Falcone sold or diverted any sugar for use in any operation of a still."

"Eighth. There is no evidence that the defendant, Joseph Falcone, conspired with any person during the times charged in the indictment to violate a law of the United States."

"Thirteenth. The defendant is not obligated to prove an alibi beyond a reasonable doubt."

"Fourteenth. If the defendant's proof as to an alibi taken into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty."

"Seventeenth. A reasonable doubt may arise from the evidence."

"Eighteenth. A reasonable doubt may arise from lack of evidence."

"Nineteenth. A reasonable doubt may arise from the character of the evidence."

"Twentieth. A reasonable doubt may arise from the character of the witnesses."

312 "Twenty-first. The indictment in this case charges only one conspiracy."

"Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies."

"Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty."

"Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts."

"Twenty-fifth. Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt."

"Twenty-sixth. To establish guilt, there must be wilful and knowing participation."

"Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty."

Your petitioner submits that the refusal of the Trial Court to charge as requested constitutes reversible error.

Sixth. Your petitioner therefore shows that he intends to prosecute this appeal, that it is made in good faith, that substantial questions are involved which should be determined by the appellate court and that in the interest of justice, he should not be incarcerated during the time for the preparation of the appeal and its presentation and decision.

Seventh. No other or previous application for the relief herein prayed for has been made to any Court or Judge except as hereinabove set forth.

313 WHEREFORE, your petitioner prays that an order may be made that pending the appeal he be admitted to bail.

Dated, June 29th, 1939.

JOSEPH FALCONE,
Petitioner.

[Duly sworn to by Joseph Falcone; jurat omitted in printing.]

314 IN UNITED STATES CIRCUIT COURT OF APPEALS—Second Circuit

[Title omitted.]

Answering affidavit of David J. Joselit

TO THE UNITED STATES CIRCUIT COURT FOR THE SECOND CIRCUIT (or a Judge thereof, if not in session):

STATE OF NEW YORK,

Northern District of New York, County of Onondaga, ss:

1. DAVID D. JOSELIT, being duly sworn, deposes and says: that he is an Assistant United States Attorney in and for the Northern District of New York; that he was assigned to and had charge of the prosecution of the above entitled criminal proceeding and was trial counsel for the Government therein; that at a stated term of the United States District Court for said District, held in the City of Auburn, New York, in the month of October 1938, an indictment was returned by the Grand Jury and filed

with the Court, charging the above named petition and others therein named with the crime of conspiracy (violation of Section 37 of the Criminal Code of the United States) (Title 18, U. S. C. A. Section 88); that such indictment alleged that the above-named petitioner and others conspired to commit various offenses against the United States, namely: violations of
315 Sections 1155 (f), (g), and (h), 1162, 1184, 1185, 1287, 1441 and 1158 (a) of Title 26, United States Code Annotated (a copy of said indictment is hereto annexed); that said indictment charged twenty-five specific overt acts committed by various defendants therein designated between on or about March 1, 1933, and October 5, 1938; that said indictment further set forth numerous objects and purposes of the conspiracy, thereby fully and comprehensively informing the above defendant and the other defendants therein named of the charges contained in said indictment.

2. That previous to the trial this petitioner made a motion before Honorable Frederick H. Bryant, United States District Judge for the Northern District of New York, for a Bill of Particulars and such application and motion was denied.

3. That the above indictment was moved for trial before said Court and a jury upon due notice; that said trial commenced May 10, 1939, and continued up to and including June 17, 1939, when the jury returned a verdict of guilty as charged against this petitioner and twenty other defendants, and acquitted three defendants; that after such verdict this petitioner made application for, and the Trial Judge granted, a postponement of the imposition of sentence until June 27, 1939; that thereafter, and on the said 27th day of June 1939, this petitioner made a motion to set aside the verdict upon the customary grounds and such motion was denied by said Honorable Court; that the above sentence was pronounced on the above named petitioner on June 27, 1939, by said Trial Judge and such sentence was that he be confined in any institution to be designated by the Attorney General for a period of two years and pay a fine of seventy-five hundred dollars and to stand committed until paid.

316 4. That on the said 27th day of June 1939, the above named petitioner filed a notice of appeal with the Clerk of the United States District Court for the Northern District of New York and served a copy thereof upon the United States Attorney for said District; that said notice of appeal does not contain a notice that the petitioner elects not to enter upon the service of his sentence pending appeal from the judgment of conviction rendered herein and upon the sentence imposed as aforesaid, pursuant to Rule V of the Rules of the Supreme Court in criminal cases; that said petitioner made application to said Trial

Judge on June 27, 1939, that he be admitted to bail pending the appeal; that such application was denied and disallowed by the Honorable Frederick H. Bryant.

5. That your deponent respectfully submits that bail should not be allowed pending such appeal, as the appeal does not involve any substantial question or questions which should be determined by the Appellate Court; that there is no merit to the appeal and that the same is not prosecuted in good faith; that the trial of the issues of fact was conducted by said Trial Judge for a period of about six weeks in a fair, impartial, and just manner, without any material or substantial errors of law whereby this petitioner was prejudiced or his rights impaired; that he was represented upon such trial by able and experienced trial counsel, namely: Daniel H. Prior, Esquire, of Albany, New York, and petitioner's nephew, Anthony S. Falcone, Esquire, of Utica, New York.

6. That the evidence adduced by the Government established a prima facie case against this petitioner and twenty-three other defendants; that about one hundred and fifty witnesses
317 were sworn on behalf of the Government and more than five hundred documentary exhibits received in evidence, together with numerous physical exhibits, and the proof offered by the Government established, without contradiction on the part of this petitioner or any of the defendants on trial, the existence and operation of twenty-two illicit and illegal distilleries located in the City of Utica and adjoining area within the Northern District of New York; that the evidence clearly showed that this petitioner was one of the heads and a principal conspirator, and that he was one of the financiers and suppliers of a huge amount of sugar which was used by the unlawful syndicate operating stills in violation of the Internal Revenue Laws of the United States within the period set forth in the indictment.

7. That the evidence did not show that this petitioner was personally engaged in the operation of the twenty-two stills named in the indictment and established by proof during the trial of said case; that the evidence against this petitioner showed that he made purchases through various sugar brokers between the months of March and September 1937, of a large quantity of sugar, to wit: eighty-six hundred bags of one hundred pounds each (eight hundred and sixty thousand pounds); that the evidence showed that the deliveries of sugar were made to and for the account of this petitioner and that such purchases and deliveries occurred during the period while eight stills were in operation in the City of Utica and its environs; that such stills are charged in the indictment and were raided and seized by

Federal and local officers; that evidence was introduced by the Government upon the trial, establishing that sugar of the same brand (Sucrest sugar), purchased by this petitioner and
318 his brother, Salvatore Falcone, was seized in stills; that evidence was introduced by the Government establishing that Sucrest sugar bags containing certain dating symbols imprinted or stenciled thereon, were found in stills, and evidence was likewise introduced showing that the sugar so purchased by this petitioner was delivered to one of the three "drops" (F. Bonomo & Company), and that the empty sugar bags containing such dating symbols were discovered by the raiding officers in several stills during the period when such sugar was purchased and delivered to this petitioner.

8. That the proof adduced by the Government showed numerous certified and other checks and documents, evidencing payment by this petitioner and his said brother, Salvatore Falcone, for such sugar; that this petitioner called as a witness in his behalf the bookkeeper of the Falcone Brothers, who testified under cross-examination that this petitioner and his said brother, Salvatore Falcone, never dealt in sugar except during the year 1937; that said witness testified that she had been employed by the Falcone Brothers for seven years and that they were partners and engaged in many business enterprises.

9. That the Government offered proof by the testimony of a witness, Louis Steinberg, an admitted alcohol dealer, residing in Syracuse, that during the year 1936 he and another alcohol dealer went to Utica where they met this petitioner; that this petitioner made a telephone call at the request of said Steinberg and as a result thereof a delivery and sale of fifteen five-gallon cans of alcohol was made to said witness.

That the Government introduced proof showing large deposits by this petitioner during the year 1937, totaling ninety thousand, six hundred and fifty-two thousand dol-
319 lars and nineteen cents, and which deposits were made by the petitioner during the period that the stills were in operation in the City of Utica and large purchases of sugar were made by this petitioner and his brother, Salvatore Falcone; that the Government likewise introduced proof that in the following year, 1938, this petitioner's total bank deposits were not in excess of twenty-five hundred dollars.

10. That independently of the foregoing evidence, the Government offered proof of association on the part of this petitioner with other defendants who were charged in the indictment, tried and convicted in the same trial; that in an effort to contradict such association evidence this petitioner offered proof of

an alibi; that said alibi consisted of evidence offered by this petitioner that he was at a boarding house at Atlantic City, New Jersey, on August 24, 1937, the same date that a prosecution witness testified he was seen in the City of Utica in association with various other defendants; that the Government introduced evidence showing that this petitioner, on September 15, 1937, personally directed the unloading of several trucks containing sugar in one-hundred-pound bags, consigned to him by the several refiners from whom purchases of such sugar were made; that such sugar bags consigned to this petitioner, contained symbols showing the dating thereof, and that similar bags containing the same brand (Sucrest sugar) and such symbols were discovered in stills seized by Federal officers shortly thereafter.

11. That the Trial Judge carefully and properly covered in his charge to the jury all pertinent questions and principles of law properly applicable to the trial of said case and to the evidence adduced therein; that the requests to charge enumerated
320 in petitioner's moving papers herein and submitted by his counsel to the Trial Judge in advance of such charge were improper and unwarranted requests as a matter of law and, therefore, the Trial Judge properly denied the same, except wherein such requests were covered by the Court's general charge; that such questions of law raised by the moving papers herein do not involve any substantial question which should be determined by the Appellate Court in the application for bail pending appeal.

12. That deponent respectfully submits that the moving papers herein do not make out a case for the relief sought within Rule VI of the Rules in criminal cases promulgated by an order of the Supreme Court of the United States on May 7, 1934, pursuant to the provisions of the Act of Congress approved March 8, 1934, entitled "An Act to Give the Supreme Court of the United State authority to Prescribe Rules of Practice and Procedure with Respect to Proceedings in Criminal Cases after Verdict." (Act of February 24, 1933, c. 119, U. S. C. Title 28, Section 723a.)

13. That the application of the petitioner, Joseph Falcone, the Defendant-Appellant, for bail during the pendency of the appeal should be denied.

DAVID D. JOSELIT,
Assistant United States Attorney,
Northern District of New York.

Subscribed and sworn to before me this 1st day of July 1939.

B. F. TOMPKINS,
Notary Public, Onondaga County.

321 In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Notice of application for bail for Henry Alberico

Please take notice that upon the notice of appeal of the above entitled defendant which was duly filed with the Clerk of the United States District Court in and for the Northern District of New York, on June 27th, 1939, a copy of which is hereto attached and made a part hereof, and upon the duly verified petition attached hereto, the undersigned will move before a Judge of this Court on the 5th day of July 1939, at the United States Courthouse, Foley Square, New York City, at four p. m. daylight saving time, or as soon thereafter as counsel may be heard, for an order that the above entitled defendant be set at liberty upon furnishing a bond in the sum of $ during the pendence of said appeal in said Circuit Court of Appeals in the Second Circuit and until the mandate of the said Circuit Court shall be issued and filed on said appeal and an order entered thereon.

Dated, June 29th, 1939.

JACK J. DANELLA, Esq.,
Attorney for Defendant-Appellant,
Henry Alberico,
322 *Office & P. O. Address, Paul Building,*
209 Elizabeth St., Utica, New York.

ROGER O. BALDWIN, Esq.,
of Counsel,
Office & P. O. Address, 210 State Tower Building,
Syracuse, New York.

To: RALPH L. EMMONS,
U. S. Attorney in and for the
Northern District of New York,
Federal Building, Syracuse, New York.

In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Petition of Henry Alberico for bail

Now comes the defendant, Henry Alberico, who resides at 776 Bleeker Street, in the City of Utica, State of New York, in the Northern District of New York, and alleges as follows:

By indictment found during the month of October 1938, by a grand jury duly impaneled in and for the District Court
323 of the Northern District of New York, and said indictment having been returned and filed on the 26th day of October 1938, the defendant was indicted with certain other defendants named therein for conspiracy to violate Section 37 of the Criminal Code of the United States (18 U. S. C. A., Sec. 88), conspiring to commit offenses against the United States, namely violation of Section 1155 f, g, and h, 1162, 1184, 1195, 1287, 1441, and 1158 A of Title 26, U. S. Code Annotated, and that after said indictment had been duly filed, your petitioner was arraigned in the aforesaid District Court of the United States, and entered a plea of "not guilty."

That thereafter and on the 10th day of May 1939, the said indictment was moved for trial in the City of Syracuse, State of New York, for the Northern District of New York; a jury was impaneled and this defendant, with others, proceeded to trial.

That thereafter and on the 17th day of June 1939, after said trial by jury and on said date, the jury rendered a verdict of "guilty" to the indictment against your petitioner and some other defendants named in said indictment.

That thereafter and on the 27th day of June 1939, the Hon. Frederick H. Bryant, justice presiding at said trial, pronounced sentence against your petitioner as follows: that your petitioner be confined in any institution designated by the Attorney General of the United States for a period of one year and one day and that he pay a fine of $3,000.00, and to stand committed until be paid.

That after the sentence above referred to was imposed by the said Court, your petitioner caused to be filed with the Clerk of the Court of the Northern District of New York, a notice of appeal, and that said notice of appeal was duly filed with
324 said Clerk on June 27th, 1939, a copy of which said notice of appeal is attached hereto and made a part of this petition.

Petitioner further shows that after filing the notice of appeals as hereinbefore set forth that a formal application for bail, pending appeal to the U. S. Circuit Court of Appeals, for the Second Circuit, was made, and said application for bail was denied and disallowed.

Your petitioner further shows that the verdict of "guilty" to the indictment hereinbefore referred to in the District Court was erroneous, against the weight of evidence and contrary to the law, and that his appeal to the Court involves substantial ques-

tions which should be determined by the Appellate Court, and that pending said appeal, he should be granted and allowed bail.

That the substantial questions involved in the said appeal and the testimony produced on said trial, upon which your petitioner was found guilty, is as follows: Your petitioner has been a resident of the City of Utica, N. Y., Northern District of New York, for a period of fifty years; that he is a citizen of the United States, has never before been convicted of any crime; that for the period of the last preceding twenty years, he has been operating a wholesale grocery store, located in the City of Utica, N. Y.; that said wholesale grocery store has been operating over this period of time as a partnership under the name of Alberico & Funicello; that the business of the said wholesale grocery company is not limited to merely the city of Utica, but extends in a radius of approximately two hundred miles from the said city; that the said firm, of which your petitioner is a partner, employs various traveling salesmen, and that the said firm has approxi-
mately fifteen hundred customers, about 90% of whom are
325 Italian grocers. That the business of your petitioner's firm is a general wholesale grocery business, selling over four hundred twenty-five different articles used in the grocery line, and among said articles purchased and sold by said firm was sugar and five gallon tin cans.

The overt acts in the indictment which were alleged as to your petitioner were two, and were overt acts #24 and #25, in said indictment; Overt Act 24 alleges that your petitioner sold large quantities of sugar to the other defendants in said indictment and to other conspirators named in said indictment, for the purpose of operating illegal and unregistered stills, and knew at the time of said sale that such sale was to be used in the operation of illegal distilleries. The Overt Act 25 mentioned in the indictment alleges, in approximately the same language, that you petitioner sold a large quantity of five gallon tin cans; that said tin cans were to be used in the illegal manufacture of alcohol.

In support of the aforesaid mentioned allegations, the Government called one David Rosen, of New York City, who testified that he was employed for the Atlas Can Co., and that some time during the year 1936, he called on your petitioner at his place of business in the City of Utica, N. Y.; that said call was not at the request of petitioner, but was made in the ordinary course of the witness's, Rosen's, business, and that thereafter, between the dates of June 1, 1936, and March 25, 1938, that your petitioner purchased approximately 30,000 five-gallon tin cans from the Atlas Can Co. This was the only, and all, of the evidence in regard to the purchase of cans by your petitioner.

Although the indictment alleges a conspiracy commencing
326 the 1st day of March, 1933, no purchase or sale of cans were ever shown except as hereinabove set forth. The only evidence in said record as to the sale of cans by your petitioner was testified to by one of the defendants who had plead guilty to the conspiracy mentioned in said indictment, and who testified for and in behalf of the Government.

This witness, one George Blake, testified that during the month of December 1937, that he and another defendant, one Salvatore Morreale, went into a partnership in the trucking business and that said business was located at 5860 N. Genesee Street in the City of Utica, N. Y., that after Blake and Morreale had been in the trucking business for some time that Morreale took him up stairs in the aforesaid mentioned building, and showed him a still, and that within two or three days thereafter, said still was torn down, and moved to a place known as 29 Whitesboro Street in the City of Utica, N. Y., where said still was again set up. That thereafter, he, Blake, opened up at 29 Whitesboro St., in the lower floor of the building, another transportation company under his own name, namely, The Blake Transportation Co.; that he received his rent free from Morreale; that he transported the alcohol made in the still at 29 Whitesboro St. in Morreale's Chevrolet pickup truck, and that on eight or ten occasions, he went to the wholesale grocery firm of your petitioner and on these occasions, placed on Morreale's truck which Blake was driving, four cartons of five gallon cans, twelve cans to the carton, and twenty bags of sugar; that the markings on the said bags of sugar was Surcrest Sugar; that on each and every occasion except one, some employee, whom he did not know, of the firm of Alberico and Funicello, loaded the merchandise onto the said truck with Blake's help. That on each occasion
327 when he went to your petitioner's place of business, he was accompanied by Salvatore Morreale.

On one occasion, Blake testified, substantially, that the petitioner, Henry Alberico, was present and that he heard a conversation between Salvatore Morreale and your petitioner, substantially as follows: That Morreale said to your petitioner "I won't be able to pay you today. I would like to get some credit." And that your petitioner said to Morreale "You will have to pay for the merchandise. Your business is too risky."

No other sale of cans or sugar to any person was proved or testified to on behalf of the Government. In this connection, the record also shows that Salvatore Morreale and his mother, and his father, before his father's death, had conducted a retail-grocery store in the City of Utica, for a period of twenty years; that the Morreal's had been customers of the firm of Alberico &

Fanicello and had purchased many and large quantities of merchandise from your petitioner's firm. As to the purchase of sugar shown by the Government, the testimony showed that over a period of approximately two years, your petitioner's firm purchased approximately ten thousand 100-pound bags of sugar from various brokers or wholesale distributors of sugar. No other testimony was offered by the Government in support of the allegations contained in the indictment against your petitioner.

Your petitioner contends that the evidence hereinbefore set forth was insufficient in law and in fact, to sustain a conviction of conspiracy as set forth in the indictment hereinbefore referred to, and that the Court erred in denying the motion made by counsel for your petitioner at the end of the Government's
328 case, and that the Court erred in denying the motion of counsel for your petitioner at the end of the whole case, to discharge the defendant.

Petitioner further shows that in defense of said allegations alleged in the indictment, that your petitioner called to testify, one Giuseppe Traversa, a traveling salesman employed by your petitioner, who sought to testify as to the amount of sugar and cans sold to various customers of your petitioner in the ordinary course of business; that the Court refused to allow the said witness to testify in regards to said sales, the Court stating that its reason was that a record had been made of said sales and the record should be produced rather than the oral testimony of the witness.

Your petitioner alleges that your petitioner, through his counsel, took an exception to the ruling of the said Court, and alleges herein that said testimony was very material and should have been allowed by the Court. It is interesting to note that the salesman, David Rosen, who sold cans to your petitioner, testified from memory as to the sales, over the objections of your petitioner's counsel, but that the Court did not allow the salesman for your petitioner to testify in the same manner.

Petitioner further points out to the Court that there is no question or doubt that the sale of five gallon cans or of granulated sugar is not, and cannot be, the basis of any criminal act; that no partnership or share in the profits of a conspiracy was shown by the Government in the testimony produced against your petitioner; that the record is absolutely bare of association with your petitioner with any of the other co-conspirators or defendants mentioned in the indictment and that even though the Government had produced evidence to show that your pe-
329 titioner knew that the cans and sugar which were sold by him were used in the illegal operation of stills, that still this evidence would not be sufficient to warrant a conviction

of conspiracy as alleged in the indictment hereinbefore referred to, and that no such testimony was ever shown.

Your petitioner further shows that proof was offered and received in evidence by the Government to show that many stills were being operated in the furtherance of the conspiracy alleged in the indictment, and that said evidence was received by the Court upon the promise of the District Attorney in charge of said prosecution that he would connect the defendants, or some of them, with these illegal operations. Your petitioner points out that the testimony of the stills being found, mash and alcohol being found, photographs and other papers, writings, were allowed in evidence as to the following places:

At 910 Morris Street in the City of Utica, N. Y., and the testimony failed to show the connection of any defendant with said still.

That evidence was offered in regard to a still found at 726 Catherine Street on October 27, 1937, and no testimony was ever shown, connecting your petitioner or any other defendant with this still.

Testimony was again offered and received in regard to a still at 3 Lamont Place on November 18, 1935, where three alleged co-conspirators who were not indicted, Drost, Anello and Cannizzaro, and no defendant was ever connected with said still.

Testimony was further offered and received in regard to a still found on October 5, 1934, at 510 Millgate St., Utica, N. Y.
330 No person was found at the still and no testimony connected your petitioner or any defendant with this still.

Again, at 310 Pitcher St. in the City of Utica, N. Y. testimony was offered and received, and no one was ever apprehended at said still, and no proof that your petitioner or any other defendant was ever connected with said still was offered.

No person was ever apprehended at a still at 1719 Pierpont Street, Utica, N. Y. and your petitioner nor any other defendant was ever connected with it.

Your petitioner further shows that the Government offered and it was received in evidence, testimony in regard to kegs of caustic soda; that your petitioner, nor any other defendants, was ever found to be connected with such purchases.

That at the end of the Government's case, a motion was made by counsel for your petitioner to strike out all of this evidence from the record, and said motion was denied.

That the Court erred in allowing this evidence to go to the jury, with which at best, they could only suspicion or speculate that your petitioner, or some other defendant, was connected therewith.

That your petitioner shows that all of the above, and many other material and substantial questions will be raised on the appeal to this Court by your petitioner.

Wherefore, your petitioner prays that an order may be granted to your petitioner, admitting him to bail in such sum as this Court may fix and that bail be granted to your petitioner during the pendence of said appeal in the said Circuit Court of Appeals in the Second Circuit.

HENRY ALBERICO,
Petitioner.

331 *Duly sworn to by Henry Alberico; jurat omitted in printing.*

332 United States Court of Appeals—Second Circuit

[Title omitted.]

Application for bail on behalf of Henry Alberico

Name and address of Appellant: Henry Alberico, 776 Bleeker St., Utica, New York.

Name and Address of Appellant's Attorney: Jack J. Danella, Paul Building, 209 Elizabeth St., Utica, New York. Roger O. Baldwin, of counsel, 210 State Tower Building, Syracuse, New York.

Offense: Violation of Section 37 of the Criminal Code of the United States (18 U. S. C. A., Section 88), conspiring to commit offenses against the United States, namely violations of Sections 1155f, g and h, 1162, 1184, 1185, 1287, 1441, and 1158a of Title 26, United States Code Annotated.

Dated of Judgment, June 27, 1939.

Brief description of judgment or sentence: To be confined in any institution designated by the attorney-general of the United States for a period of one year and one day, and to pay a fine of $3,000.00 and to stay committed until the fine be paid.

Name of prison where now confined, if not on bail: At the present time, defendant is in the custody of the United States marshall in and for the Northern District of New York at the Federal Building in the City of Syracuse, New York, and
333 is transferred to the Oneida County Jail in the City of Utica, County of Oneida, and State of New York.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-named on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of the sentence pending appeal, dated June 27th, 1939.

HENRY ALBERICO,
Appellant.

Grounds of Appeal:

1—The Court erred in denying the motion of the defendant made at the close of the Government's case to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to establish a prima facie case.

2—The Court erred in denying the motion of the defendant made at the close of all of the evidence, to dismiss the indictment and to discharge the defendant on the ground that the Government had failed to present evidence sufficient to submit a question of fact to the jury.

3—The Court erred in refusing to permit the witness, Giuseppe Traversa, an employee of the defendant, to testify as to the sales of five gallon cans and sugar to various customers of the defendant.

4—The Court erred in denying the motion made at the close of the Government's case to strike out evidence concerning stills, papers, writings, photographs and automobiles not connected in any way to any of the defendants.

5—The Court erred in allowing in evidence the conversa-
334 tions between the defendants George Blake and Salvatore Morreale which conversations were not had in the presence of the defendant but were hearsay as to him, and no part of the conspiracy alleged.

In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Answering affidavit of David D. Joselit

To the United States Circuit Court for the Second Circuit (or a Judge thereof, if not in session):

STATE OF NEW YORK,
Northern District of New York, County of Onondaga, ss:

1. David D. Joselit, being duly sworn, deposes and says: that he is an Assistant United States Attorney in and for the Northern District of New York; that he was assigned to and had charge of the prosecution of the above entitled criminal proceedings and was trial counsel for the Government therein; that at a stated term of the United States District Court for said District, held in the City of Auburn, New York, in the month of October 1938,

an indictment was returned by the Grand Jury and filed with the Court, charging the above named petitioner and others therein named with the crime of conspiracy (violation of Section
335 37 of the Criminal Code of the United States) (Title 18, U. S. C. A. Section 88); that such indictment alleged that the above named petitioner and others conspired to commit various offenses against the United States, namely: violations of Sections 1155 (f), (g), and (h), 1162, 1184, 1185, 1287, 1441, and 1158 (a) of Title 26, United States Code Annotated (a copy of said indictment is hereto annexed); that said indictment charged twenty-five specific overt acts committed by various defendants therein designated between on or about March 1, 1933, and October 5, 1938; that said indictment further set forth numerous objects and purposes of the conspiracy, thereby fully and comprehensively informing the above defendant and the other defendants therein named of the charges contained in said indictment.

2. That previous to the trial this petitioner made a motion before Honorable Frederick H. Bryant, United States District Judge for the Northern District of New York, for a Bill of Particulars and such application and motion was denied.

3. That the above indictment was moved for trial before said Court and a jury upon due notice; that said trial commenced May 10, 1939, and continued up to and including June 17, 1939, when the jury returned a verdict of guilty as charged against this petitioner and twenty other defendants, and acquitted three defendants; that after such verdict this petitioner made application for, and the Trial Judge granted, a postponement of the imposition of sentence until June 27, 1939; that thereafter, and on the said 27th day of June 1939, this petitioner made a motion to set aside the verdict upon the customary grounds and such motion was denied by said Honorable Court; that the above sentence was pro-
336 nounced on the above named petitioner on June 27, 1939, by said Trial Judge and such sentence was that he be confined in any institution to be designated by the Attorney General for one year and one day and to pay a fine of three thousand dollars, and to stand committed until paid.

4. That on the said 27th day of June 1939, the above named petitioner filed a notice of appeal with the Clerk of the United States District Court for the Northern District of New York and served a copy thereof upon the United States Attorney for said District; that said petitioner made application to said Trial Judge on June 27, 1939, that he be admitted to bail pending the appeal; that such application was denied and disallowed by the Honorable Frederick H. Bryant.

5. That your deponent respectfully submits that bail should not be allowed pending such appeal, as the appeal does not involve

any substantial question or questions which should be determined by the Appellate Court; that there is no merit to the appeal and that the same is not prosecuted in good faith; that the trial of the issues of fact was conducted by said Trial Judge for a period of about six weeks in a fair, impartial, and just manner, without any material or substantial errors of law whereby this petitioner was prejudiced or his rights impaired; that he was represented by able and experienced trial counsel, namely: Jack J. Danella, Esquire, of Utica, New York, and Roger O. Baldwin, Esquire, of counsel, of Syracuse, New York, formerly an Assistant United States Attorney.

6. That the evidence adduced by the Government established a prima facie case against this petitioner and the twenty-three other defendants named in the indictment; that such proof established without contradiction the existence and operation of
337 twenty-two illicit and illegal distilleries located in the City of Utica and adjoining area, within the Northern District of New York; that the indictment specifically charges this petitioner with the commission of overt acts numbered twenty-four and twenty-five; that the evidence clearly showed that this petitioner was the senior member of the firm of Alberico & Funicello, wholesale grocers in Utica, New York; that this petitioner purchased during the year 1937 a total of nine thousand, six hundred and eighty-eight bags of one hundred pounds each (nine hundred and sixty-eight thousand, eight hundred pounds) of granulated sugar, that a portion of such purchases were made during the months of January, February, and March 1937, and the evidence introduced by the Government showed that there were five or six stills in operation in the Utica area during such period; that during the three months period aforesaid, early in 1937, the evidence showed that this petitioner purchased a total of five thousand, three hundred and *and* forty-three bags, or over a half million pounds of sugar; the evidence further shows that these purchases dropped off during April 1937, after the seizure of five stills in the Utica area, within a period of four days, between April 10, 1937, and April 14, 1937; that during the month of May 1937, when no stills were in operation, this petitioner made no purchases of sugar but that such purchases of sugar increased during September 1937, when the evidence showed the stills began to operate; that the purchases of sugar by this petitioner rose and fell with the seizure of the stills charged in the indictment and established by the evidence offered by the Government during the trial.

That this petitioner had knowledge of the purpose for which the sugar was being used, inasmuch as he personally made

338 direct sales of such sugar to defendants who operated stills; that the evidence likewise showed that this defendant purchased sugar from Joseph Falcone, another defendant convicted herein, at a price in excess of the amount he was paying for sugar direct from the refiners.

The evidence offered by the Government also showed that the Atlas Can Company sold to this petitioner during the period between June 1936 to June 1937, an average of six hundred cans per week, or a total of approximately thirty-five thousand cans; that additionally, fifty-four hundred cans were purchased by the petitioner between the months of September 1937 and March 1938, when various stills were in operation in the Utica area: that such cans were seized by Federal officers; the evidence showed that no other merchant in the City of Utica purchased five-gallon tin cans of the same pattern as those seized in the several stills by Government officers; that such five-gallon tin cans were employed by the still operators, charged in the indictment and tried and convicted on the trial, for the purpose of transporting finished alcohol from the illicit distilleries.

That George O. Blake, a defendant who entered a plea of guilty, testified on behalf of the Government that during February and March 1938, on eight or ten different occasions he went to the wholesale grocery firm of this petitioner, with another defendant named in the indictment, Salvatore Morreale, and that there was loaded on the said Morreale's truck, which was driven by the said witness Blake, four or five cartons of five-gallon tin cans, twelve cans to the carton, and twenty bags of Sucrest sugar, which said load of cans and sugar were transported by said defendants to the still then in operation and located at 29 Whitesboro Street, Utica, New York; that said sugar and
339 cans were picked up by said Blake and Morreale at a garage located in the rear of the wholesale grocery warehouse of Alberico & Funicello, which said garage was under the direct supervision of this petitioner, Henry Alberico, who was present on several occasions when such deliveries of cans were made to said defendants.

That this petitioner had knowledge of the purpose for which said cans and sugar were being used, inasmuch as there was testimony by the defendant, George O. Blake, to a conversation between the said Alberico and Salvatore Morreale concerning credit; that the said petitioner, Henry Alberico, stated to Morreale as follows: "You will have to pay for the merchandise, your business is too risky."

That this petitioner, Henry Alberico, called several character witnesses but no evidence was adduced by him showing the dis-

position of the large quantities of sugar and tin cans purchased and sold as aforesaid.

That various witnesses on behalf of the Government testified to the discovery and seizure of cartons in various stills, which cartons contained the inscription: "Alberico & Funicello, Utica, N. Y., from Atlas Can Company," which said cartons were identified by Government witnesses as being cartons which contained Atlas cans; that there was evidence on behalf of the Government showing seizures of numerous cans of the type and pattern identified by an officer of the Atlas Can Company as being distinctive cans manufactured by said concern and sold and delivered to this petitioner's firm.

That the evidence adduced on behalf of the Government showed that Sucrest sugar and Atlas cans seized in the various stills charged in the indictment were purchased either by the Falcone Brothers or Alberico & Funicello; that the jury were justi-
340 fied in drawing an inference that this petitioner was a "blind" for the purchase and sale of sugar and for tin cans in large quantities, which were employed in the unlawful distillation and transportation of illicit and illegal alcohol.

7. That the Government further offered proof of checks and other documentary exhibits, evidencing payment for such sugar and tin cans on the part of this petitioner, which said checks were signed by this petitioner for the said firm of "Alberico & Funicello"; that such documentary evidence clearly showed a business relationship between this petitioner and Joseph Falcone, another defendant convicted at said trial; that the jury drew a logical and justifiable inference from such evidence that this petitioner was one of the principal sources of sugar and cans during the period embraced in the indictment.

8. That the Court properly denied motions made on behalf of the petitioner to strike out evidence concerning illicit stills charged in the indictment and proven on the trial; that the Trial Judge properly denied motions made on behalf of this petitioner at the close of the Government's case; that the Trial Court properly submitted the evidence to the jury with respect to this defendant and that the jury verdict of guilty is adequately established by the proof introduced by the Government against this petitioner.

9. That the Trial Judge carefully and properly covered in his charge to the jury all pertinent questions and principles of law applicable to the evidence against this petitioner; that the grounds for the appeal stated in the notice of appeal, claiming error on the part of the Trial Court, are unwarranted and without merit as a matter of law; that no substantial rights of this

petitioner were invaded and there are no substantial questions which should be determined by the Appellate Court on this appeal.

341 10. That deponent respectfully submits that the moving papers herein do not make out a case for the relief sought within Rule VI of the Rules in criminal cases promulgated by an order of the Supreme Court of the United States on May 7, 1934, pursuant to the provisions of the Act of Congress approved March 8, 1934, entitled, "An Act to give the Supreme Court of the United States Authority to Prescribe Rules of Practice and Procedure with Respect to Proceedings in Criminal Cases after Verdict." (Act of February 24, 1933, c. 119, U. S. C. Title 28, Section 723a.)

11. That the aplication of the petitioner, Henry Alberico, the Defendant-Appellant, for bail during the pendency of the appeal should be denied.

DAVID D. JOSELIT,
Assistant United States Attorney,
Northern District of New York.

Subscribed and sworn to before me this 1st day of July 1939.

B. F. TOMPKINS,
Notary Public, Onondaga County.

342 In United States Circuit Court of Appeals—Second Circuit

[Title omitted.]

Order granting bail for defendants, Salvatore Falcone, Joseph Falcone and Henry Alberico, and denying bail for Lawrence Grimaldi, Nicholas Nole, John Nole, John Melito, Salvatore A. Graniero, Frank Joseph Milozzo, Frank Soldano

July 10, 1939

346 Salvatore Falcone, Joseph Falcone, and Henry Alberico, having duly filed and served a Notice of Appeal from the judgment of conviction rendered herein and from the sentences imposed upon each of them herein on the 27th day of June 1939, by the Trial Court, and having made application for admission to bail during the pendency of the appeal herein, and such applications having duly come on to be heard before the Honorable Learned Hand, Judge of the United States Court of Appeals for the Second Circuit, on July 5th, 1939, and said Judge having heard such application admitted said defendants and others hereinafter named to temporary bail pending

347 argument before and decision on such applications by the said Court of Appeals on July 10th, 1939, and such applications having duly come on to be heard before said United States Court of Appeals for the Second Circuit at the Courtroom of said Court in the Federal Building in the City of New York on the 10th day of July, 1939, and the appellants, Salvatore Falcone and Joseph Falcone, appearing by Ransom H. Gillett, Esq., their attorney for said appeal, and Daniel H. Prior, Esq., of counsel, and the appellant Henry Alberico, appearing by Jack Danella, his attorney, and Roger O. Baldwin, Esq., of counsel, and the Government appearing by Honorable Ralph L. Emmons, United States Attorney for the Northern District of New York, and David D. Joselit, Assistant United States Attorney, of counsel.

Now, upon reading and filing the petitions of Salvatore Falcone, Joseph Falcone, and Henry Alberico, respectively dated and verified the 29th day of June 1939, and the Notices of Motion of these applications addressed to Honorable Ralph L. Emmons, the said United States Attorney for the Northern District of New York, dated June 29th, 1939, and upon all the papers and proceedings had herein, all submitted in aid of said applications, and the affidavits of David D. Joselit, Assistant United States Attorney for the Northern District of New York, sworn to the 1st day of July 1939, submitted in opposition thereto, and after hearing Daniel H. Prior, of counsel, for the appellants Salvatore Falcone and Joseph Falcone, and Roger O. Baldwin, of counsel, for the appellant Henry Alberico, in favor of said applications, and David D. Joselit, Assistant United States Attorney in opposition thereto, and due deliberation hav-

348 ing been had thereon, and it appearing that the appeal may involve a substantial question which should be determined by the Appellate Court, it is

Ordered, that the defendants-appellants, Salvatore Falcone, Joseph Falcone, and Henry Alebrico, be set at liberty pending their respective appeals upon furnishing undertakings of bail as follows:

Salvatore Falcone, in the sum of $20,000.00; Joseph Falcone, in the sum of $15,000.00; Henry Alberico, in the sum of $5,000.00; approved as to form and sufficiency by a Judge of the United States District Court for the Northern District of New York, or by a United States Commissioner, resident and acting within said Northern District of New York, during the pendency of said appeals in said Circuit Court of Appeals for the Second Circuit

and until the Mandate of said Circuit Court shall be issued and filed on said appeals and an order entered thereon, and

It further appearing that the appellants, John Melito, Salvatore A. Graniero, Lawrence Grimaldi, Frank Joseph Milozzo, John Nole, Nicholas Nole, and Frank Soldano, filed and served a Notice of Appeal from the judgment of conviction rendered herein and from the sentences imposed upon each of them on the 27th day of June 1939, by the Trial Court, and having made application for admission to bail during pendency of their appeals herein, and such applications having duly come on to be heard before the said United States Court of Appeals for the Second Circuit at the Courtroom of said Court in the Federal Building in the City of New York on the 10th day of July 1939,

349 and the said appellants, John Melito, Salvatore A. Graniero, Lawrence Grimaldi, Frank Joseph Milozzo, John Nole, Nicholas Nole, and Frank Soldano, appearing by Irving K. Baxter, Esq., in aid of said applications, and the Government appearing by David D. Joselit, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that the applications of the defendants-appellants John Melito, Salvatore A. Graniero, Lawrence Grimaldi, Frank Joseph Milozzo, John Nole, Nicholas Nole, and Frank Soldano, for admission to bail during the pendency of their appeals herein, in said Circuit Court of Appeals for the Second Circuit, be and the same hereby are in all respects denied and disallowed, and it is further

Ordered, that the said defendants-appellants John Melito, Salvatore A. Graniero, Lawrence Grimaldi, Frank Joseph Milozzo, John Nole, Nicholas Nole, and Frank Soldano be committed to the custody of the United States Marshal for the Northern District of New York, during the pendency of their appeals herein, and until the Mandate or further order of said Circuit Court of Appeals, unless the said defendants-appellants pending their appeals shall elect to enter upon the service of the sentences imposed by the Trial Court herein.

LEARNED HAND,
THOMAS W. SWAN,
AUGUSTUS N. HAND,
Judges of the United States Court of Appeals, for the Second Circuit.

350 A true copy.
D. E. ROBERTS, *Clerk.*

In United States District Court—For the Northern District of New York

[Title omitted.]

Order extending time to file bill of exceptions and assignments of error on behalf of appellants Salvatore Falcone, Joseph Falcone, and Henry Alberico

A Motion having been made by the defendants, Henry Alberico, Salvatore Falcone, and Joseph Falcone, for an extension of time in which to file a bill of exceptions, assignment of error, and complete the record on appeal, and said motion having been heard on the 13th day of July 1939, said time within the thirty days period limited by Rule 9 of the Supreme Court, governing procedure after verdict in criminal cases in District Courts, and upon reading and filing the affidavit of Clement A. Munger, the official reporter of the United States District Court in and for the Northern District of New York herein, said affidavit states that
351 it will be impossible for him to complete the transcript of the testimony taken on said trial before the first day of October 1939, and upon the affidavit of Roger O. Baldwin, attorney, and upon all of the papers and proceedings heretofore had herein, and Roger O. Baldwin, Esq., having been heard on behalf of said motion for the appellants, and Hon. Robert J. Leamy, having been heard on behalf of the Government of the United States, it is

Ordered, that the motion of the defendants above named be granted and that the time of the defendants to file their bill of exceptions and assignment of errors, is hereby extended to and including the first day of November, 1939.

(Signed) FREDERICK H. BRYANT,
U. S. D. J.

In United States District Count—For the Northern District of New York

[Title omitted.]

Petition for extension of time for filing

Roger O. Baldwin, being duly sworn, deposes and says that he is a practicing attorney and counsel of law, having an office at 210 State Tower Building, in the City of Syracuse, New York.

That he is attorney for the above entitled defendant, Henry
352 Alberico, and that Daniel H. Prior, Esq., of the City of Albany, New York, is attorney of record for Salvatore Falcone and Joseph Falcone, and that this deponent is of counsel.

That on the 17th of day of June, 1939, the above mentioned defendants were convicted at Syracuse, New York, of the crime of conspiracy in the District Court in and for the Northern District of New York, and that thereafter and on the 27th day of June, 1939, the above-entitled defendants duly filed their notice of appeal with the clerk of the District Court in and for the Northern District of New York. That thereafter and on the 10th day of July, 1939, the above entitled defendants moved the United States Circuit Court of Appeals, in and for the Second Circuit, for an application for bail, said bail having been denied by the District Court in and for the Northern District of New York. That upon said application for bail the defendant, Henry Alberico, was granted bail pending appeal in the sum of Five Thousand Dollars ($5,000.00), the defendant Salvatore Falcone was granted bail pending appeal in the sum of Twenty Thousand Dollars ($20,000.00), and the defendant Joseph Falcone was granted bail pending appeal in the sum of Fifteen Thousand Dollars ($15,000.00), and pursuant to the order of said Second Circuit Court, bail was given in the above-mentioned amounts before United States Commissioner Gordon Samuels, in the City of Utica, New York. That the defendants herein are desirous of prosecuting said appeal in the United States Circuit Court for the Second Circuit as speedily as possible, but that it is impossible to file their assignment of errors and bill of exceptions within the thirty days period prescribed by Rule 9 of the Supreme Court of the United States, governing procedure after verdict in crim-
353 inal cases in District Courts, that thirty days have not elapsed since the above-mentioned defendants were sentenced and that the said defendants are desirous of making an application to this Court for an order extending the defendants' time to file their assignment of errors and bill of exceptions, so that said appeal may be perfected. That deponent has procured an affidavit which is attached hereto and made a part of the proceedings, from the official stenographer of the District Court in and for the Northern District of New York, saying that it is impossible for him to complete the transcript of said minutes prior to the first day of October 1939.

Wherefore, Your deponent prays that an order may be granted extending the time for the filing of the bill of exceptions and assignment of errors in the appeal of the above-entitled defendants to and including the first day of November 1939.

ROGER O. BALDWIN.

Sworn to before me this 12th day of July 1939.

JACK DANELLA,
Notary Public, Oneida Co., N. Y.

354 In United States District Court

Affidavit of Official Reporter

June 30, 1939.

Clement A. Munger, Certified Shorthand Reporter, having offices at 91 State Street, Albany, New York, and being the official reporter of the United States District Court for the Northern District of New York, being duly sworn, deposes and says:

I personally reported the trial of the United States of America v. Salvatore Falcone, and others, held in Syracuse; that the trial lasted six weeks; and I estimate there will be at least four thousand pages of testimony in the record; that it will take at least until the 1st of October 1939 to complete typing the record.

(Signed) CLEMENT A. MUNGER.

Subscribed and sworn to this 30th day of June 1939.

EDWARD N. SCHNEIBERLING,
Notary Public.

355 In United States District Court—Northern District of New York

[Title omitted.]

Order Extending Time on Appeal

This cause coming on further to be heard before this Court, on the petition of the above-named defendants, other than defendants, Alberico and Falcones, and it appearing to this Court that the said defendants have been unable to procure the Stenographic record herein so as to specifically set forth Assignments of Error; but that said defendants have filed appeals,

Now, on motion of I. K. Baxter, Attorney for said defendants, other than, Alberico and Falcones, it is hereby

Ordered, that the April 1939 term of this Court be extended ninety days from the date hereof for the purpose of signing and settling the Bill of Exceptions to be signed and settled and filed herein, and for all other purposes; and it is further

Ordered, that the United States of America, Complainant herein, and the above-named defendants, be granted an ex-
356 tension of time to be and appear at the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., of ninety days from the date hereof.

FREDERICK H. BRYANT,
U. S. District Judge.

Filed Aug. 22, 1939.

R. A. PORTER, *Clerk.*

In United States District Court—For the Northern District of New York

[Title omitted.]

Assignment of Errors on Behalf of Appellant, Salvatore Falcone

Now comes the defendant, Salvatore Falcone, by his attorney, and says that in the proceeding herein and in the orders and judgments entered there are manifest errors, to wit:

Assignment of Error No. 1

The Court erred in denying the motion made in behalf of the defendant, Salvatore Falcone, at the close of the Government's case, to dismiss the indictment on the ground that the Gov-
357 ernment had failed to prove a case, and that the evidence was insufficient as a matter of law to sustain the indictment.
(R. Page 133; Denied, 139.)

Assignment of Error No. 2

The Court erred in denying the motion made in behalf of the defendant, Salvatore Falcone, at the end of the whole case to dismiss the indictment and for a direction of a verdict of not guilty on the ground that the evidence was insufficient as a matter of law to sustain the indictment; that there was no question of fact to submit to the jury and that any verdict adverse to the defendant would be contrary to the law and against the evidence and against the weight of the evidence. (R. Pages 167, 168; Denied, 168.)

Assignment of Error No. 3

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about October 24, 1934. (R. Page 140.)

This is entitled in the record "Still No. 2." The substance of the evidence is a person named Paul Kiscel not identified but indicted and not apprehended and not on trial leased the premises in May 1934 from the First Citizens Trust Company of Utica, New York; that a plumber connected water pipes to the building and that on or about October 24, 1934, Federal Alcohol Tax Unit Investigators found and seized a still in operation at the premises; that no one was on the premises and no arrests were made.

This testimony was objected to and the following is from the record:

358 Mr. PRIOR. I object to the exhibits introduced in the evidence of the still premises and to the entire testimony given, that it was incompetent, irrevelant, immaterial, and improper and move that all the evidence be stricken out as to this raid at 726 Catherine Street from the record on the ground that it in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Pages 55, 56.)

Assignment of Error No. 4

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 3 Lamott Place, Yorkville, New York, in November 1935. (R. Page 141.)

This is entitled in the record "Still No. 3." The substance of the evidence is that on or about November 16, 1935, Federal Alcohol Tax Unit Investigators seized a still at the premises and arrested therein three persons not indicted but named in the indictment as co-conspirators.

Assignment of Error No. 5

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 510 Millgate Street, Utica, New York, on or about October 5, 1934. (R. Page 141.)

This is entitled in the record "Still No. 4." The substance of the evidence is that Fred Apelian, a defendant, who before the trial had pleaded guilty, was arrested while operating a

359 still at the premises; that one Peter Lima, now deceased brought him there to work; that a person giving the name, Frank Brady, had rented the premises from the owner. Objection was made to the receipt of the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court over defendant's objection received it subject to connection. (R. Page 61.)

Assignment of Error No. 6

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 310 Pitcher Street, Utica, New York, on or about April 14, 1937. (R. Page 141.)

This is entitled in the record "Still No. 8." The substance of the evidence is that Federal Alcohol Tax Unit Investigators on or about April 14, 1937, seized two stills at the premises. No one was on the premises. No arrests were made. Bags of sugar and tin cans were found. The following objections were taken by the defendants:

Mr. BYRNE. I think if the Court please I will object to those exhibits as incompetent, irrelevant, immaterial, and improper, and also move that all of the evidence of this witness as to this raid on Pitcher Street be stricken from the record on the ground that it is in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. BYRNE. May I have an exception. And in the event that it isn't later connected may I have the right to renew the motion?

The COURT. Yes; I will entertain the motion. (R. Pages 65, 66.)

360 Assignment of Error No. 7

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about September 30, 1937. (R. Page 142.)

This is entitled in the record "Still No. 9." The substance of the evidence is that on September 30, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was present. Articles were found. Empty sugar bags were found. Some were received in evidence. Objection was made by the defendants on the ground that the evidence was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 67.)

Assignment of Error No. 8

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 400 Railroad Street, Frankfort, New York, on or about November 5, 1937. (R. Page 142.)

This is entitled in the record "Still No. 10." The substance of the evidence is that on November 5, 1937, Federal Alcohol Tax Unit Investigators raided the premises. No arrests were made and in the building where a steam boiler, bottoms of mash vats and staves from mash vats, residue of yeast fermentation, tin cans and containers, one empty Sucrest sugar bag were found. Objection was made by the defendant to the evidence on the

ground that it was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 68.)

361 Assignment of Error No. 9

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 1719 Pierrepont Avenue, Utica, New York, on or about April 28, 1937. (R. Page 142.)

This is entitled in the record "Still No. 11." The substance of the evidence is that on April 28, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was on the premises and no arrests were made. Evidence was received that there were on the premises the following articles: One 1000-gallon still; 90 empty five-gallon cans; 60 empty folding can cartons; 25 empty Starlight Brand sugar bags; 25 empty Hershey Brand sugar bags, marked "A–9"; a receiving tank, stamped "Doyle Hardware Company, Utica, New York." The following is from the record:

By Mr. Joselit:

Q. And have you with you the inventories which you personally made and kept on April 28, 1937?

A. I have.

Q. By reference to your inventories will you tell us as quickly as you can the contents of these premises?

A. One 1000 gallon——

Mr. Prior (Interruption). I object to this as irrelevant and immaterial. I am doing this because the U. S. Attorney has not connected them up and I think it is unfair to have this picture of a number of stills apparently in this district unless they can be connected with some defendant, and further, he hasn't said he is going to.

362 Mr. Byrne. Same objection.

The Court. Overruled.

Mr. Prior. Exception. (R. Page 70.)

Assignment of Error No. 10

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 910 Morris Street, Utica, New York, on or about January 17, 1938. (R. Page 143.)

This is entitled in the record "Still No. 14." The substance of the evidence is that on January 17, 1938, Federal Alcohol Tax

Unit Investigators seized a still at the premises. Still apparatus, fuel, yeast, sugar bags, and other articles were found on the premises. This was received by the Court subject to connection. (R. Page 74.)

Assignment of Error No. 11

The Court erred in refusing to charge the following of the written requests to charge submitted by the defendant, Salvatore Falcone, prior to the charge as directed by the Court: (R. Pages 185–187.)

First. That the evidence in reference to the defendant, Salvatore Falcone, is circumstantial evidence.

Second. That in a case of circumstantial evidence, unless the evidence excludes to a moral certainty every reasonable hypothesis except that of guilt, the verdict of the Jury must be not guilty.

Fourth. The jury may find an inference only from a fact.

Fifth. The jury may not build an inference upon an inference.

363 Sixth. There is no evidence that Salvatore Falcone was a partner with Joseph Falcone in the business of buying or selling sugar in the year 1937.

Seventh. The jury may not infer that Salvatore Falcone was in partnership with Joseph Falcone in the buying and selling of sugar in the year 1937, and from that inference infer that the sugar was used for an unlawful purpose.

Eighth. There is no evidence that the defendant Salvatore Falcone conspired with any person during the times charged in the indictment to violate a law of the United States.

Thirteenth. The defendant is not obliged to prove an alibi beyond a reasonable doubt.

Fourteenth. If the defendant's proof as to an alibi taken into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty.

Seventeenth. A reasonable doubt may arise from the evidence.

Eighteenth. A reasonable doubt may arise from lack of evidence.

Nineteenth. A reasonable doubt may arise from the character of the evidence.

Twentieth. A reasonable doubt may arise from the character of the witnesses.

Twenty-first. The indictment in the case charges only one conspiracy.

Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty.

364 Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth. Acquaintance or association with persons engaged in an unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth. To establish guilt, there must be wilful and knowing participation.

Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

Assignment of Error No. 12

The Court erred in denying the motion of the defendant, Salvatore Falcone, to set aside the verdict and for a new trial. (R. Page 189.)

And by reason of the said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated, October 14, 1939.

RANSOM H. GILLETT,
Attorney for Defendant.

To: Honorable Ralph L. Emmons, United States Attorney, for the Northern District of New York.

To: The Clerk of the United States District Court for the Northern District of New York.

365 In United States District Court—For the Northern District of New York

[Title omitted.]

Assignment of Errors on Behalf of Appellant, Joseph Falcone

Now comes the defendant, Joseph Falcone, by his attorney, and says that in the proceeding herein and in the orders and judgments entered there are manifest errors, to wit:

Assignment of Error No. 1

The Court erred in denying the motion made in behalf of the defendant, Joseph Falcone, at the close of the Government's case,

to dismiss the indictment on the ground that the Government had failed to prove a case, and that the evidence was insufficient as a matter of law to sustain the indictment. (R. Page 127; Denied, 139.)

Assignment of Error No. 2

The Court erred in denying the motion made in behalf of the defendant, Joseph Falcone, at the end of the whole case to dismiss the indictment and for a direction of a verdict of not guilty on the ground that the evidence was insufficient as a matter of law to sustain the indictment; that there was no question of fact to submit to the jury and that any verdict
366 adverse to the defendant would be contrary to the law and against the evidence and against the weight of the evidence. (R. Pages 167, 168; Denied, 168.)

Assignment of Error No. 3

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York on or about October 24, 1934. (R. Page 140.)

This is entitled in the record "Still No. 2." The substance of the evidence is a person named Paul Kiscel not identified but indicted and not apprehended and not on trial leased the premises in May, 1934 from the First Citizens Trust Company of Utica, New York; that a plumber connected water pipes to the building and that on or about October 24, 1934 Federal Alcohol tax Unit Investigators found and seized a still in operation at the premises; that no one was on the premises and no arrests were made.

This testimony was objected to and the following is from the record:

Mr. PRIOR. I object to the exhibits introduced in the evidence of the still premises and to the entire testimony given, that it was incompetent, irrelevant, immaterial and improper and move that all of the evidence be stricken out as to this raid at 726 Catherine Street from the record on the ground that it in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Pages 55, 56.)

367 Assignment of Error No. 4

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 3 Lamott Place, Yorkville, New York, in November 1935. (R. Page 141.)

This is entitled in the record "Still No. 3." The substance of the evidence is that on or about November 16, 1935, Federal Alcohol Tax Unit Investigators seized a still at the premises and arrested therein three persons not indicted but named in the indictment as co-conspirators.

Assignment of Error No. 5

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 510 Millgate Street, Utica, New York, on or about October 5, 1934. (R. Page 141.)

This is entitled in the record "Still No. 4." The substance of the evidence is that Fred Apelian, a defendant, who before the trial had pleaded guilty, was arrested while operating a still at the premises; that one Peter Lima, now deceased, brought him there to work; that a person giving the name Frank Brady had rented the premises from the owner. Objection was made to the receipt of the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court over defendant's objection received it subject to connection. (R. Page 61.)

Assignment of Error No. 6

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 310 Pitcher Street, Utica, New York, on or about April 14, 1937. (R. Page 141.)

368 This is entitled in the record "Still No. 8." The substance of the evidence is that Federal Alcohol Tax Unit Investigators on or about April 14, 1937, seized two stills at the premises. No one was on the premises. No arrests were made. Bags of sugar and tin cans were found. The following objections were taken by the defendants:

Mr. BYRNE. I think if the Court please I will object to those exhibits as incompetent, irrelevant, immaterial, and improper, and also move that all of the evidence of this witness as to this raid on Pitcher Street be stricken from the record on the ground that it is in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. BYRNE. May I have an exception. And in the event that it isn't later connected may I have the right to renew the motion?

The COURT. Yes; I will entertain the motion. (R. Pages 65, 66.)

Assignment of Error No. 7

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about September 30, 1937. (R. Page 142.)

This is entitled in the record "Still No. 9." The substance of the evidence is that on September 7, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was present. Articles were found. Empty sugar bags were found. Some were received in evidence. Objection was made by the defendants on the ground that the evidence was immaterial
369 and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 67.)

Assignment of Error No. 8

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 400 Railroad Street, Frankfort, New York on or about November 5, 1937. (R. Page 142.)

This is entitled in the record "Still No. 10." The substance of the evidence is that on November 5, 1937, Federal Alcohol Tax Unit Investigators raided the premises. No arrests were made and in the building where a steam boiler, bottoms of mash vats and staves from mash vats, residue of yeast fermentation, tin cans and containers, one empty Sucrest sugar bag were found. Objection was made by the defendant to the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 68.)

Assignment of Error No. 9

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 1719 Pierrepont Avenue, Utica, New York on or about April 28, 1937. (R. Page 142.)

This is entitled in the record "Still No. 11." The substance of the evidence is that on April 28, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was on the premises and no arrests were made. Evidence was received that there were on the premises the following articles: one

370 1000-gallon still; 90 empty five-gallon cans; 60 empty folding can cartons; 25 empty Starlight Brand sugar bags; 25 empty Hershey brand sugar bags, marked "A–9"; a receiving tank, stamped "Doyle Hardware Company, Utica, New York." The following is from the record:

By Mr. JOSELIT:

Q. And have you with you the inventories which you personally made and kept on April 28, 1937?

A. I have.

Q. By reference to your inventories will you tell us as quickly as you can the contents of these premises?

A. One 100 gallon——

Mr. PRIOR (Interruption). I object to this as irrelevant, and immaterial. I am doing this because the U. S. Attorney has not connected them up and I think it is unfair to have this picture of a number of stills apparently in this district unless they can be connected with some defendant, and further, he hasn't said he is going to.

Mr. BYRNE. Same objection.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Page 70.)

Assignment of Error No. 10

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 910 Morris Street, Utica, New York on or about January 17, 1938. (R. Page 143.)

This is entitled in the record "Still No. 14." The substance of the evidence is that on January 17, 1938 Federal
371 Alcohol Tax Unit Investigators seized a still at the premises. Still apparatus, fuel, yeast, sugar bags and other articles were found on the premises. This was received by the Court subject to connection. (R. Page 74.)

Assignment of Error No. 11

The Court erred in denying the motion made in behalf of the defendant, Joseph Falcone, at the end of the whole case to strike out evidence of the purchase by defendant, Joseph Falcone, of sugar. (R. Page 146.)

Assignment of Error No. 12

The Court erred in refusing to charge the following of the written requests to charge submitted by the defendant, Joseph

Falcone, prior to the charge as directed by the Court (R. Pages 182–185):

Fourth. The jury may find an inference only from a fact.

Fifth. The jury may not build an inference upon an inference.

Sixth. There is no evidence that Joseph Falcone sold or diverted any sugar for use in any operation of a still.

Eighth. There is no evidence that the defendant, Joseph Falcone, conspired with any person during the times charged in the indictment to violate a law of the United States.

Thirteenth. The defendant is not obliged to prove an alibi beyond a reasonable doubt.

Fourteenth. If the defendant's proof as to an alibi taken into consideration with all the other evidence raises a reasonable doubt in the minds of the jury, the jury's verdict must be not guilty.

372 Seventeenth. A reasonable doubt may arise from the evidence.

Eighteenth. A reasonable doubt may arise from lack of evidence.

Nineteenth. A reasonable doubt may arise from the character of the evidence.

Twentieth. A reasonable doubt may arise from the character of the witnesses.

Twenty-first. The indictment in this case charges only one conspiracy.

Twenty-second. The requirement of proof under this indictment is not satisfied by proof of a number of disconnected conspiracies.

Twenty-third. If the jury find that the defendants or some of them were parties to a number of disconnected conspiracies, the verdict must be not guilty.

Twenty-fourth. Mere knowledge of unlawful acts of others does not make one a participant of unlawful acts.

Twenty-fifth. Acquaintance or association with persons engaged in unlawful conspiracy is not in and of itself sufficient to establish guilt.

Twenty-sixth. To establish guilt, there must be wilful and knowing participation.

Twenty-eighth. The jury may not convict a defendant even though they think he is guilty, unless they are satisfied by the evidence beyond a reasonable doubt that he is guilty.

Assignment of Error No. 13

The Court erred in denying the motion of the defendant, Joseph Falcone, to set aside the verdict and for a new trial. (R. Pages 189, 190.)

And by reason of the said errors and other manifest
373 errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated, October 14, 1939.

RANSOM H. GILLETT,
Attorney for Defendant.

To: Honorable Ralph L. Emmons, United States Attorney for the Northern District of New York.

To: The Clerk of the United States District Court for the Northern District of New York.

In United States District Court—for the Northern District of New York

[Title omitted.]

Assignment of errors on behalf of appellant, Henry Alberico

Now comes the defendant, by his attorney, and says that in the proceeding herein, and in the orders and judgments entered, there are manifest errors, to wit:

Assignment of Error No. 1

The Court erred in denying a motion made on behalf of the defendant to dismiss the indictment at the end of the
374 Government's case, on the ground that the evidence was insufficient as a matter of law to sustain the indictment. (R. Page 135; denied, Page 139.)

Assignment of Error No. 2

The Court erred in denying a motion made by the defendant at the end of the whole case to dismiss the indictment and for a direction of a verdict of "not guilty" on the indictment. (R. Page 168; Denied, Page 169.)

Assignment of Error No. 3

The Court erred, over objection and exception of defendant's counsel, in not permitting on direct examination of defendant's witness, George Moore, the following questions:

"Q. Can you tell us approximately, Mr. Moore, on an average how much oil you have sold him within the last eighteen years?

Mr. JOSELIT. That is objected to as immaterial.

The COURT. Sustained.

Q. Can you tell us how much oil you sold Mr. Alberico in the year 1937?

Mr. JOSELIT. That is objected to as immaterial.
The COURT. Sustained.
Mr. DANELLA. Exception. (R. Page 161.)

Assignment of Error No. 4

The Court erred, over objection and exception of defendant's counsel, in not permitting on direct examination of defendant's witness, Joseph Traverasa, the following questions:

375 "Q. Now, in the course of your sales to your customers do you sell sugar?
A. Sure.
Q. In one hundred bags?
A. In one-hundred-pound bags; yes, sir.
Q. In 1937 are you able to state what the average sales of sugar per month were by you?
Mr. JOSELIT. That question is objected to as incompetent, irrelevant, and immaterial; not the proper method of proof.
The COURT. I think I will sustain. He has got records to show that.
By Mr. DANELLA:
Q. What do you do with you records as you make a sale, Mr. Traverasa?
A. I give it to the office.
Q. Every week do you turn in your records to the office as to the orders you receive for that week?
A. Sure.
Q. They fill the orders and send them to the customers?
A. And send them to the customers.
Q. And they keep your records. Are you able to state approximately from your memory how many bags of sugar you sold in the year 1937?
Mr. JOSELIT. That is objected to on the ground that the records are the best evidence and they are within the possession of this defendant.
The COURT. Sustained.
Mr. DANELLA. Exception.

376 By Mr. DANELLA:
Q. Mr. Traverasa, do you sell five-gallon tin cans?
A. I do.
Q. To your customers?
A. Sure.
Q. And most of your customers are Italian grocery stores?
A. Most of them.
Q. Are you able to state whether many of those customers buy olive oil in bulk?

A. On all my territory about twenty, or twenty-five.

Mr. JOSELIT. If the Court please: That is objected to.

The COURT. Sustained.

The COURT. You say that most of your customers are Italian grocers?

The WITNESS. Yes, sir.

The COURT. How big a proportion are Italian grocers?

The WITNESS. About seventy-five or eighty percent are Italian.

By Mr. DANELLA:

Q. You say about seventy-five or eighty per cent of your customers are Italian grocers who run grocery stores?

A. Yes.

The COURT. I understand you do not travel in Utica at all?

The WITNESS. No.

The COURT. You have the rural sections?

The WITNESS. That is right.

377 By Mr. DANELLA:

Q. Do you know, Mr. Traverasa, for what purpose these five-gallon tin cans were sold or are used for?

Mr. JOSELIT. That is objected to on the ground it is immaterial and not within the issues of this case.

The COURT. Sustained.

Mr. DANELLA. Exception. That is all." (R. Pages 162-163.)

Assignment of error No. 5

The Court erred, over objection and exception of defendant's counsel, in not permitting on redirect examination of defendant's witness, Joseph Traverasa, the following questions:

"By Mr. DANELLA:

Q. And about how many items of groceries do you sell?

A. Four hundred and twenty-five, about that.

Q. No; I mean how many besides sugar and cans, what else do you sell?

Mr. JOSELIT. That is objected to as immaterial.

The COURT. Sustained.

Mr. DANELLA. Exception." (R. Page 164.)

Assignment of error No. 6

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about October 24, 1934. (R. Page 140.)

378 This is entitled in the record "Still No. 2." The substance of the evidence is a person named Paul Kiscel not identified but indicted and not apprehended and not on trial leased the premises in May 1934 from the First Citizens Trust Company of Utica, New York; that a plumber connected water pipes to the building and that on or about October 24, 1934, a Federal Alcohol Tax Unit Investigators found and seized a still in operation at the premises; that no one was on the premises and no arrests were made.

This testimony was objected to and the following is from the record:

Mr. PRIOR. I object to the exhibits introduced in the evidence of the still premises and to the entire testimony given, that it was incompetent, irrelevant, immaterial, and improper and move that all of the evidence be stricken out as to this raid at 726 Catherine Street from the record on the ground that it in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Pages 55, 56.)

Assignment of error No. 7

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 3 Lamott Place, Yorkville, New York, in November 1935. (R. Page 141.)

This is entitled in the record "Still No. 3." The substance of the evidence is that on or about November 16, 1935, Federal Alcohol Tax Unit Investigators seized a still at the premises and arrested therein three persons not indicted but named in the indictment as co-conspirators.

379 Assignment of Error No. 8

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 510 Millgate Street, Utica, New York, on or about October 5, 1934. (R. Page 141.)

This is entitled in the record "Still No. 4." The substance of the evidence is that Fred Apelian, a defendant, who before the trial had pleaded guilty, was arrested while operating a still at the premises; that one Peter Lima, now deceased brought him there to work; that a person giving the name, Frank Brady, had rented the premises from the owner. Objection was made to the receipt of the evidence on the ground that it was immaterial and

not connected with any defendant on trial. The Court over defendant's objection received it subject to connection. (R. Page 61.)

Assignment of Error No. 9

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 310 Pitcher Street, Utica, New York on or about April 14, 1937. (R. Page 141.)

This is entitled in the record "Still No. 8." The substance of the evidence is that Federal Alcohol Tax Unit Investigators on or about April 14, 1937, seized two stills at the premises. No one was on the premises. No arrests were made. Bags of sugar and tin cans were found. The following objections were taken by the defendants:

Mr. BYRNE. I think if the Court please I will object to those exhibits, as incompetent, irrelevant, immaterial, and improper, and also move that all of the evidence of this witness as to
380 this raid on Pitcher Street be stricken from the record on the ground that it is no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. BYRNE. May I have an exception. And in the event that it isn't later connected may I have the right to renew the motion?

The COURT. Yes; I will entertain the motion. (R. Pages 65, 66.)

Assignment of Error No. 10

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about September 30, 1937. (R. Page 142.)

This is entitled in the record "Still No. 9." The substance of the evidence is that on September 30, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was present. Articles were found. Empty sugar bags were found. Some were received in evidence. Objection was made by the defendants on the ground that the evidence was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 67.)

Assignment of Error No. 11

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at

400 Railroad Street, Frankfort, New York on or about November 5, 1937. (R. Page 142.)

This is entitled in the record "Still No. 10." The substance
381 of the evidence is that on November 5, 1937, Federal Alcohol Tax Unit Investigators raided the premises. No arrests were made in the building where a steam boiler, bottoms of mash vats and staves from mash vats, residue of yeast fermentation, tin cans and containers, one empty Sucrest sugar bag were found. Objection was made by the defendant to the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 68.)

Assignment of Error No. 12

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 1719 Pierrepont Avenue, Utica, New York, on or about April 28, 1937. (R. Page 142.)

This is entitled in the record "Still No. 11." The substance of the evidence is that on April 28, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was on the premises and no arrests were made. Evidence was received that there were on the premises the following articles: one 1,000-gallon still; 90 empty five-gallon cans; 60 empty folding can cartons; 25 empty Starlight Brand sugar bags; 25 empty Hershey brand sugar bags, marked "A–9"; a receiving tank, stamped "Doyle Hardware Company, Utica, New York." The following is from the record:

By Mr. JOSELIT:

Q. And have you with you the inventories which you personally made and kept on April 28, 1937?

A. I have.

Q. By reference to your inventories will you tell us as quickly as you can the contents of these premises?

382 A. One 1,000 gallon——

Mr. PRIOR (interruption). I object to this as irrelevant, and immaterial. I am doing this because the U. S. Attorney has not connected them up and I think it is unfair to have this picture of a number of stills apparently in this district unless they can be connected with some defendant, and further, he hasn't said he is going to.

Mr. BYRNE. Same objection.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Page 70.)

Assignment of Error No. 13

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 910 Morris Street, Utica, New York, on or about January 17, 1938. (R. Page 143.)

This is entitled in the record "Still No. 14." The substance of the evidence is that on January 17, 1938 Federal Alcohol Tax Unit Investigators seized a still at the premises. Still apparatus, fuel, yeast, sugar bags and other articles were found on the premises. This was received by the Court subject to connection. (R. Page 74.)

Assignment of Error No. 14

The Court erred in denying a further motion to strike testimony from the record in regards to sugar bags, five-gallon tin cans, and conversations. (R. Pages 146, 147, 148, 149, 150.)

And by reason of the said errors, and other manifest errors appearing in the record herein, the defendant prays
383 that the judgment of conviction be set aside and that he be discharged from custody.

Dated, September 22nd, 1939.

ROGER O. BALDWIN, ESQ.,
Attorney for Henry Alberico,
Office & P. O. Address, 210 State Tower Bldg.,
Syracuse, New York.

To: Hon. Ralph L. Emmons, United States Attorney, Federal Building, Syracuse, New York.

To: Clerk U. S. District Court, Northern District of New York, Federal Building, Syracuse, New York.

384 In United States District Court—Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF
vs.
SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, JOHN NOLE, ET AL, DEFENDANTS

Assignment of errors on behalf of appellant, John Nole

Now comes the defendant by his attorney, and says that in the proceeding herein, and in the orders and judgments entered, there are manifest errors, to wit:

Assignment of Error No. 1

The Court erred in denying a motion made on behalf of the defendant to dismiss the indictment at the end of the Government's case, on the ground that the evidence was insufficient as a matter of law to sustain the indictment. (R. Pages 150, 151, 152.)

Assignment of Error No. 2

The Court erred in denying a motion made by the defendant at the end of the whole case to dismiss the indictment and for a direction of a verdict of "not guilty" on the indictment. (R. Pages 169.)

Assignment of Error No. 3

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about October 24, 1934. (R. Page 140.)

385 This is entitled in the record "Still No. 2." The substance of the evidence is a person named Paul Kiscel not identified but indicted and not apprehended and not on trial leased the premises in May, 1934 from the First Citizens Trust Company of Utica, New York; that a plumber connected water pipes to the building and that on or about October 24, 1934 Federal Alcohol tax Unit Investigators found and seized a still in operation at the premises; that no one was on the premises and no arrests were made.

This testimony was objected to and the following is from the record:

Mr. PRIOR. I object to the exhibits introduced in the evidence of the still premises and to the entire testimony given, that it was incompetent, irrelevant, immaterial and improper and move that all of the evidenec be stricken out as to this raid at 726 Catherine Street from the record on the ground that it in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Pages 55, 56.)

Assignment of Error No. 4

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 3 Lamott Place, Yorkville, New York in November, 1935. R. Page 141.)

This is entitled in the record "Still No. 3." The substance of the evidence is that on or about November 16, 1935, Federal Alcohol Tax Unit Investigators seized a still at the premises and arrested therein three persons not indicted but named in the indictment as co-conspirators.

386 Assignment of Error No. 5

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 510 Millgate Street, Utica, New York on or about October 5, 1934. (R. Page 141.)

This is entitled in the record "Still No. 4." The substance of the evidence is that Fred Apelian, a defendant, who before the trial had pleaded guilty, was arrested while operating a still at the premises; that one Peter Lima, now deceased, brought him there to work; that a person giving the name, Frank Brady, had rented the premises from the owner. Objection was made to the receipt of the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court over defendant's objection received it subject to connection. (R. Page 61.)

Assignment of Error No. 6

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 310 Pitcher Street, Utica, New York on or about April 14, 1937. (R. Page 141.)

This is entitled in the record "Still No. 8." The substance of the evidence is that Federal Alcohol Tax Unit Investigators, on or about April 14, 1937 seized two stills at the premises. No one was on the premises. No arrests were made. Bags of sugar and tin cans were found. The following objections were taken by the defendants:

Mr. BYRNE. I think if the Court please I will object to those exhibits as incompetent, irrelevant, immaterial, and improper, and also move that all of the evidence of this witness as to
387 this raid on Pitcher Street be stricken from the record on the ground that it is in no way associated or connected with any named defendant in this conspiracy indictment.

The COURT. Overruled.

Mr. BYRNE. May I have an exception. And in the event that it isn't later connected may I have the right to renew the motion?

The COURT. Yes; I will entertain the motion. (R. Pages 65, 66.)

Assignment of Error No. 7

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 726 Catherine Street, Utica, New York, on or about September 30, 1937. (R. Page 142.)

This is entitled in the record "Still No. 9." The substance of the evidence is that on September 30, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was present. Articles were found. Empty sugar bags were found. Some were received in evidence. Objection was made by the defendants on the ground that the evidence was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 67.)

Assignment of Error No. 8

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 400 Railroad Street, Frankfort, New York, on or about November 5, 1937. (R. Page 142.)

388 This is entitled in the record "Still No. 10." The substance of the evidence is that on November 5, 1937, Federal Alcohol Tax Unit Investigators raided the premises. No arrests were made in the building where a steam boiler, bottoms of mash vats, and staves from mash vats, residue of yeast fermentation, tin cans and containers, one empty Sucrest sugar bag were found. Objection was made by the defendant to the evidence on the ground that it was immaterial and not connected with any defendant on trial. The Court received it subject to connection. (R. Page 68.)

Assignment of Error No. 9

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 1719 Pierrepont Avenue, Utica, New York, on or about April 28, 1937. (R. Page 142.)

This is entitled in the record "Still No. 11." The substance of the evidence is that on April 28, 1937, Federal Alcohol Tax Unit Investigators seized a still at the premises. No one was on the premises and no arrests were made. Evidence was received that there were on the premises the following articles: one 1,000-gallon still; 90 empty five-gallon cans; 60 empty folding can cartons; 25 empty Starlight Brand sugar bags; 25 empty Hershey brand sugar bags, marked "A–9"; a receiving tank, stamped

"Doyle Hardware Company, Utica, New York." The following is from the record:

By Mr. JOSELIT:

Q. And have you with you the inventories which you personally made and kept on April 28, 1937?

A. I have.

389 By reference to your inventories will you tell us as quickly as you can the contents of these premises?

A. One 1,000 gallon——

Mr. PRIOR (interrupting). I object to this as irrelevant and immaterial. I am doing this because the U. S. Attorney has not connected them up and I think it is unfair to have this picture of a number of stills apparently in this district unless they can be connected with some defendant, and further, he hasn't said he is going to.

Mr. BYRNE. Same objection.

The COURT. Overruled.

Mr. PRIOR. Exception. (R. Page 70.)

Assignment of Error No. 10

The Court erred in denying the motion to strike from the record all of the evidence in regard to the seizure of a still at 910 Morris Street, Utica, New York, on or about January 17, 1938. (R. Page 143.)

This is entitled in the record "Still No. 14." The substance of the evidence is that on January 17, 1938, Federal Alcohol Tax Unit Investigators seized a still at the premises. Still apparatus, fuel, yeast, sugar bags, and other articles were found on the premises. This was received by the Court subject to connection. (R. Page 74.)

And by reason of the said errors, and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

390 Dated, October 14th, 1939.

STANLEY PALEWSKI,
Attorney for John Nole,
310 Arcade Bldg., Utica, N. Y.

To: Hon. Ralph L. Emmons, United States Attorney, Federal Building, Syracuse, New York.

To: Clerk U. S. District Court, Northern District of New York, Federal Building, Syracuse, New York.

391 In United States District Court—For the Northern District of New York

[Title omitted.]

Assignment of errors on behalf of appellants, Salvatore A. Graniero et al.

Now comes Salvatore A. Graniero, Lawrence Grimaldi, John Melito, Frank J. Milozzo, John Nole, Nicholas Nole, and Frank Saldano, defendants-appellants above named, praying for an appeal to the U. S. Court of Appeals for the Second Circuit from the judgment of conviction rendered against them June 27, 1939, on the charge of conspiracy, section 37 of the Criminal Code of the U. S., and from the adverse rulings and charges of the court on which said convictions were based; and file this their assignment of errors, on which they rely in said appeal; and say that the said judgment of conviction, rulings, and charges are unlawful and unjust for the following reasons:

1. The trial court erred in overruling the demurrer to the indictment, in refusing the demand for a bill of particulars,
392 and in denying the motion to quash the indictment; because the indictment was vague and indefinite, improperly combined many different alleged offenses and defendants and was too general in its allegation.

2. The trial court erred in denying motions for a mistrial on the ground that the jury had been unlawfully informed by the court that some of the defendants had pleaded guilty to the indictment and that one defendant was permitted during the trial to plead guilty to the indictment in the presence and hearing of the jury; because said information and proceeding unlawfully informed the jury that, in the opinion of the defendants pleading guilty, there was a conspiracy as charged in the indictment and that they were members of such conspiracy, greatly to the prejudice of the defendants on trial in that it prevented them from getting a fair trial on lawful evidence alone.

3. The trial court erred in permitting evidence unlawfully obtained by the use of an invalid and void search warrant to be used against defendants; because said search warrant failed to particularly describe the place to be searched and was therefore issued in violation of the 4th amendment to the constitution of the U. S., and the use of the evidence unlawfully obtained under cover of its authority violated the 5th amendment in that in effect it compelled defendants to give evidence against themselves in a criminal action.

4. The trial court erred in overruling motions to discharge defendants on the ground that there was insufficient evidence and

no legal evidence upon which a verdict of guilty might properly be founded; because the evidence presented was circumstantial only, from it an inference of innocence could as logically be drawn as an inference of guilt and the only positive information given to the jury that there was a conspiracy was the unlawful and opinion evidence of such defendants as pleaded guilty.

393

5. The trial court erred in charging the jury in substance, that if the facts and circumstances lead to belief that some of the defendants had planned or schemed or connived to defraud the U. S. of taxes, that that would prove the conspiracy as charged in the indictment; because unless said defendants agreed to execute the plan or scheme and at least one of them did something to effect the object of the conspiracy, there could be no criminal conspiracy.

6. The trial court erred in charging the jury in substance that "the testimony regarding each still seizure, even though it does not connect any or only one or two defendants therewith, bears upon the question of the existence or nonexistence of a conspiracy," and that from testimony showing similarity of methods or leasing, similarity of products found, the method of furnishing bail and attorneys to operators in one or two instances, etc., bear upon the question of whether these stills were erected and operated "by the same group or crowd or whether each was erected and operated independently of each other"; because all of such facts and circumstances were entirely consistent with a theory of innocence and neither proved nor disproved the alleged conspiracy.

Wherefore, the appellants pray that these assignments of errors be considered by the Honorable Circuit Court of Appeals and the judgment and rulings complained of be reversed.

IRVING K. BAXTER,
Attorney for Defendants-Appellants.

394 In United States District Court—Northern District of New York

[Title omitted.]

Notice pursuant to rule VII

SIRS: Please take notice that pursuant to Rule VII of the United States Supreme Court Criminal Rules, promulgated May 7, 1934, I, Frederick H. Bryant, the Trial Judge presiding at the above entitled trial, hereby direct that you appear before me at

my Chambers in the Federal Building, Malone, New York, on the 10th day of August 1939, at two o'clock P. M. (E. S. T.) there to receive such directions as may be appropriate with respect to the preparation of the record on appeal to the United States Circuit Court of Appeals, Second Circuit, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings herein.

Dated at Malone, N. Y., August 3, 1939.

FREDERICK H. BRYANT,
United States District Judge.

To: Ransom H. Gillett, Esquire, Attorney for Salvatore and Joseph Falcone, Defendants-Appellants, D. & H. Building,
395 Albany, N. Y.; and Daniel H. Prior, Esquire, 93 State Street, Albany, N. Y.; Jack J. Danella, Esquire, Attorney for Henry Alberico, Defendant-Appellant, Paul Building, 209 Elizabeth St., Utica, N. Y.; and Roger O. Baldwin, Esquire, 210 State Tower Building, Syracuse, N. Y., Maxwell Shapiro, Esquire, Attorney for Salvatore A. Graniero, Defendant-Appellant, 217 Broadway, New York City, N. Y.; Irving K. Baxter, Esquire, Attorney for Nicholas Nole, John Nole, Lawrence Grimaldi, Frank Soldano and Frank J. Milozzo, Defendants-Appellants, 215 Rutger St., Utica, N. Y.; and

To: Ralph L. Emmons, Esquire, U. S. Attorney, Federal Building, Binghamton, N. Y.

396 In United States District Court

[Title omitted.]

Order for substitution of attorneys

Oct. 16, 1939

Upon the affidavits of Michael Nole and Angeline Nole, of Utica, New York duly sworn to the 13th day of October 1939, and upon the motion of Stanley Palewski, Esq., of Utica, New York, and it seeming right to the court, it is hereby ordered,

That Stanley Palewski, Esq., of Utica, New York, be substituted in the place and stead of Irving K. Baxter, Esq., as the attorney for John Nole, one of the defendants in the above case for the purposes of prosecuting his appeal in the Circuit Court, Second Circuit of the United States.

Enter:

FREDERICK H. BRYANT,
District Judge.

221403—40——16

397 In United States District Court—Northern District of New York

[Title omitted.]

Affidavit of Michael Nole for motion

Michael Nole, of 215 Kossuth Ave., Utica, New York being duly sworn deposes and says that he is the brother of John Nole, one of the defendants in the above entitled action.

That on August 27, 1939, deponent visited said John Nole at Lewisburg Penitentiary, at Lewisburg, Pennsylvania, where said John Nole is now incarcerated as a result of being found guilty in this matter in the District Court, Northern District of New York. That at that time deponent had a long conversation with his brother John, and said John Nole instructed deponent to substitute Stanley Palewski, Esq. of Utica, New York, for his present attorney, Irving K. Baxter, Esq. of the same place for the purpose of prosecuting the Appeal of said John Nole in the Circuit Court.

That subsequently your deponent on returning to Utica apprised said Irving K. Baxter, Esq., of John Nole's decision,
398 and told said Irving K. Baxter, Esq., that said John Nole desired a change of attorneys. That deponent has attempted to locate said Irving K. Baxter during the past two days to obtain a voluntary stipulation of substitution of attorneys, but deponent couldn't locate him, was finally informed by John Baxter, brother of Irving K. Baxter, Esq. that said Irving K. Baxter was on his way to the State of Georgia, to remain there for some time, the extent of which is not known to deponent. That deponent, as the agent of John Nole, has paid said Irving K. Baxter, Esq. in full for his services rendered. That deponent hereby, as the brother and agent of John Nole, prays the court for an order substituting Stanley Palewski, Esq. of Utica, New York, for said Irving K. Baxter, Esq., to prosecute the appeal of said John Nole in the Circuit Court. That no previous application has been made for the relief demanded herein.

MICHAEL NOLE.

Sworn to before me this 13th day of October, 1939.

ROCCO S. MASCARO,
Comm. of Deeds, Utica, N. Y.

399 In United States District Court—Northern District of New York

[Title omitted.]

Affidavit of Angeline Nole for Motion

Angeline Nole, of 215 Kossuth Ave., Utica, New York, being duly sworn deposes and says that she is the lawful wife of John

Nole, one of the defendants in the above entitled case. That on the 27th day of August, 1939, she visited her husband at the Lewisburg Penitentiary at Lewisburg, Pennsylvania. That at that time her husband requested a change of attorneys, to wit, that Stanley Palewski, Esq. of Utica, be substituted in the place and stead of Irving K. Baxter, Esq., his present attorney, and further requested that Michael Nole act for him in the said matter.

ANGELINE NOLE.

Sworn to before me this 13th day of October, 1939.

ROCCO S. MASCARO,
Comm. of Deeds, Utica, N. Y.

400 In United States District Court—Northern District of New York

[Title omitted.]

Stipulation as to Exhibits and Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing Bill of Exceptions is correct in each particular, that with the exhibits, all of which are to be submitted to the Circuit Court of Appeals on the argument by appropriate stipulation and order, it contains all the evidence in this cause, and that it may be duly signed, settled, and allowed by the Hon. Frederick H. Bryant, United States District Judge, who presided at the trial of this cause.

Dated: , 1939.

401 RALPH L. EMMONS, Esq.,
United States Attorney,
Federal Building, Syracuse, New York.
DANIEL PRYOR, Esq.,
Attorney for Defendants-Appellants,
Salvatore Falcone and Joseph Falcone,
93 State Street, Albany, New York.
ROGER O. BALDWIN, Esq., and
JACK J. DANELLA, Esq.
Attorneys for Defendant-Appellant, Henry Alberico,
210 State Tower Bldg., Syracuse, New York.
IRVING K. BAXTER, Esq.,
Attorney for Defendants-Appellants, John Melito, Salvatore Graniero, Lawrence Grimaldi, Nicholas Nole, Frank Soldano, and Frank J. Milozzo,
215 Rutger St., Utica, N. Y.
STANLEY PALEWSKI,
Attorney for John Nole,
310 Arcade Bldg., Utica, N. Y.

402 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation as to record

It is heerby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above-entitled matter as agreed upon by the parties.

Dated: , 1939.

403 RALPH L. EMMONS, Esq.,
United States Attorney, Attorney for Appellee,
Federal Building, Syracuse, New York.
DANIEL H. PRYOR, Esq.,
Attorney for Defendants-Appellants,
Salvatore Falcone and Joseph Falcone,
93 State Street, Albany, New York.
ROGER O. BALDWIN, Esq., and
JACK J. DANELLA, Esq.,
Attorneys for Defendant-Appellant, Henry Alberico,
210 State Tower Bldg., Syracuse, New York.
IRVING K. BAXTER, Esq.,
Attorney for Defendants-Appellants, John Melito, Salvatore Graniero, Lawrence Grimaldi, Nicholas Nole, Frank Soldano, and Frank J. Milozzo,
215 Rutger St., Utica, N. Y.
STANLEY PALEWSKI,
Attorney for John Nole,
310 Arcade Bldg., Utica, N. Y.

404 In United States District Court—Northern District of New York

[Title omitted.]

Order settling record

This is to certify that the foregoing Bill of Exceptions rendered by the Defendants-Appellants is correct in every particular, that with the exhibits, all of which are to be submitted to the Circuit Court of Appeals on the argument by appropriate stipulation and order, it contains all the evidence in this cause, and the said exhibits are hereby made part of this Bill of Exceptions, and it is hereby settled, allowed, and made a part of the record in this cause.

Dated: , 1939.

HON. FREDERICK H. BRYANT,
United States District Judge.

405 In United States District Court—Northern District of New York

[Title omitted.]

Order directing filing of record

On the consent of the attorneys for the respective parties, the foregoing printed record is hereby ordered filed in lieu of the original papers, for the purpose of certifying a record on appeal.

Dated: , 1939.

Hon. FREDERICK H. BRYANT,
United States District J'dge.

406 [Clerk's Certificate to foregoing transcript omitted in printing.]

408 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT, APPELLEE
vs.
LAWRENCE GRIMALDI, ET AL., DEFENDANTS, APPELLANTS

Motion to correct record on appeal from the U. S. District Court for the Northern District of N. Y.

Irving K. Baxter, being duly sworn, deposes and says: That he is Attorney for the above-named Appellant: That at the trial of the case evidence was offered which had been obtained by Federal Officers through search and seizure under color of authority of a void search warrant, as appear on pages 77 & 78 of the printed record: That said record omits the material matters set out in the second paragraph of the Certificate of the Trial Judge, which matters should be added to the Record after the first paragraph on page 78:

Deponent further says that, as stated in the said certificate of the Trial Judge, he objected to the bringing before the Court a codefendant on trial (one Elmer Pflanz, on June 9, 1939) and, in the presence and hearing of the Jury, permitting him to change his plea to guilty of conspiracy as charged in the indictment: Also, that at the close of the evidence he moved for a directed verdict of not guilty and for the discharge of the defend-
409 ant on the ground that there was insufficient evidence, and no legal evidence, upon which said defendant might be lawfully convicted.

Deponent further says that it was arranged at the direction of the Trial Judge that there be a single printed record for all the appellants, and that the various counsel meet together to prepare said record. That deponent did meet with the other attorneys for that purpose, and at said meeting stated that the grounds on which he was relying in the appeal were the three matters hereinabove referred to and that those were the particular things which he wanted printed in the record: That the other attorneys thereupon agreed that said matters should be printed in the record: That the proposed record was not actually printed until about the last day for printing and filing the record: That deponent attended before the trial court at the time fixed for settling and signing the record: That at the said time he was handed a copy of said printed record by the attorney who had charge of the printing thereof, and was told by said attorney that the particular matters that deponent wanted printed (as above indicated) were in the printed record: That relying on this information and not having time or opportunity to read the four hundred page record, deponent signed the stipulation approving the record: That shortly thereafter, upon reading the record, deponent discovered that the aforesaid matters had been omitted: That thereupon he took the matter up with the trial Judge, and obtained the certificate of said Judge which is hereto attached.

Wherefore said appellant by his attorney respectfully
410 prays this Honorable Court to amend said record by adding the matters certified by the trial Judge.

IRVING K. BAXTER,
Attorney for Lawrence Grimaldi,
Martin Bldg., Utica, N. Y.

Sworn to before me this 3rd day of January 1940.

HARRIET WILLIAMS,
Notary Public, Oneida County.

411 In United States District Court for the Northern District of New York

UNITED STATES OF AMERICA, COMPLAINANT
vs.
HENRY ALBERICO, SALVATORE FALCONE, JOSEPH FALCONE, SALVATORE A. GRANIERO, LAWRENCE GRIMALDI, JOHN MELITO, FRANK J. MILOZZO, JOHN NOLE, NICHOLAS NOLE, FRANK SALDANO, DEFENDANTS-APPELLANTS

Certificate

It appearing from the printed record on appeal in the above case that the following material matters were omitted from the

said record, now on request of Irving K. Baxter, attorney for appellant Lawrence Grimaldi, I hereby certify that, according to my recollection and docket, the following three paragraphs are substantially correct.

Claiming that the search warrant used by the agents in raiding premises No. 1166 Webster Ave., Utica, N. Y., was void for defective description, Mr. Baxter objected on behalf of defendant Grimaldi to the use of the evidence obtained under color of its authority, and moved to have said evidence quashed and stricken from the record, on the ground that said search and seizure having been made under color of authority of a void search warrant was therefore made without any warrant or authority
412 in law and in violation of the defendant's constitutional rights as guaranteed by the 4th amendment to the Constitution of the U. S. and that the use of the evidence obtained thereby against him in a criminal action would be a violation of the 5th amendment in that in substance it would be compelling him to be a witness against himself. That the court overruled said objection and denied the motions and the defendant duly excepted.

On the 9th day of June, 1939, Elmer Pflanz, one of the defendants on trial, in the presence and hearing of the jury, was allowed to withdraw his plea of not guilty to conspiracy as charged in the indictment and to plead guilty to said charge. Thereupon Mr. Baxter, as attorney for Lawrence Grimaldi, a co-defendant, objected to such proceeding on the ground that the jury was thereby unlawfully informed that, in the opinion of defendant Pflanz at least, there was a conspiracy as charged in the indictment and that said Pflanz was a member of said conspiracy, greatly to the prejudice of the other defendants remaining on trial; and moved for a mistrial and the discharge of the jury on the ground that defendants could no longer obtain a fair trial before that jury. The court over-ruled the objection, and denied the motion, and due exception was taken.

At the close of the evidence Mr. Baxter, on behalf of defendant Lawrence Grimaldi, moved for a directed verdict of not guilty and for the discharge of the defendant, on the ground that there was insufficient evidence and no lawful evidence upon which said defendant might be lawfully convicted.
413 The court denied the motion, and the defendant duly excepted.

Dated at Malone, N. Y., November 22, 1939.

FREDERICK H. BRYANT,
U. S. District Judge,
Northern District of New York.

414 In United States Circuit Court of Appeals for the Second Circuit

No. 193—October Term, 1939.

(Argued January 10, 1940. Decided February 13, 1940.)

UNITED STATES, APPELLEE,

vs.

SALVATORE FALCONE, AND OTHERS, APPELLANTS.

Appeals by the defendants from judgments of conviction of the District Court for the Northern District of New York, under an indictment for a conspiracy to operate illicit stills.

Before: L. HAND, CHASE, and CLARK, Circuit Judges.

Daniel I. Prior for Salvatore Falcone and Joseph Falcone; Roger O. Baldwin for Alberico; Stanley Palewski for John Nole; Irving K. Baxter for Lawrence Grimaldi, Nicholas Nole, Salvatore Graniero and Frank Soldano; David D. Joselit for the appellee.

415 *Opinion*

L. HAND, C. J.:

These appeals are from convictions for a conspiracy to operate illicit stills. There were originally sixty-eight defendants, but the appeals before us concern only eight, which may be divided into two groups: one those of the appellants, Salvatore and Joseph Falcone, Alberico, John and Nicholas Nole; the other, of Grimaldi, Graniero, and Soldano. Two other defendants, Milozzo and Melito, have withdrawn their appeals. The second group were actual distillers; the first supplied them and other distillers with sugar, yeast, and cans, out of which the alcohol was distilled, or in which it was sold. The evidence disclosed that in the year 1937 and 1938 within a radius of fifty miles from the City of Utica some twenty-two illicit stills had been set up, which were in each case to some extent operated after the same pattern; that is to say, real property was bought or leased, motor cars were registered, and applications for electric and water services were made, all in fictitious names; the equipment and materials were bought from the same persons; and the distillers frequented the same café or saloon, where they talked together. Grimaldi, Graniero and Soldano were all operators of one or more stills; the evidence of their guilt was ample; and they complain only of the manner in which the trial was conducted. We shall reserve their objections till the end, because the most serious matter is as to the sufficiency of the evidence to support the verdict against the others.

The case against Joseph Falcone was that during the year 1937 he sold sugar to a number of grocers in Utica, who in turn sold to the distillers. He was a jobber in Utica, and bought his supply from a New York firm of sugar brokers; between March first and September 14, 1937, he bought 8,600 bags of sugar of 100 pounds each, which he disposed of to three customers:
416 Frank Bonomo & Company, Pauline Aiello, and Alberico and Funicello, all wholesale grocers in Utica. Some of the bags in which this sugar was delivered were later found at the stills, when these were raided by the officials; and Falcone was seen on one occasion assisting in delivering the sugar at Bonomo's warehouse, when a truckload arrived. His business in sugar was far greater while the stills were active than either before they were set up, or after they were seized, and we shall assume that the evidence was enough to charge him with notice that his customers were supplying the distillers. The evidence against Salvatore Falcone went no further than to show in various ways that he helped his brother in purchase of sugar during the period in question; there is really nothing to show that he knew its eventual destination. However, since in the view we take of the law he was equally innocent if he did, in disposing of his case we shall assume that he did know. Alberico was a member of the firm of Alberico and Funicello who, as we have just said, were buyers from Joseph Falcone. Alberico's purchases and sales of sugar also varied with the activity of the stills. In the first three months of 1937, when there were five or six of these operating in or about Utica, his purchases ran up to over a half-million pounds; after they had been raided in April, his business fell off to very little; when they became active again in September, his purchases rose again. A like correspondence, though less exact, was proved for the early part of the year 1938. A jury might also have taken the conversation which he had with one of the distillers, Morreale, as evidence of his knowledge of the kind of business that he was supplying. While the stills were active, Alberico also did a large business in five-gallon cans which he sold direct to the distillers. Many cans sold by him were found at the stills when they were raised. The evidence against Nicholas Nole consisted of his sales of yeast
417 and cans to the distillers. The prosecution proved that in the spring of 1937 he had ordered and received shipments of imported yeast through a forwarding company of which he was the owner; and that in July and August of that year he bought of the Atlantic Yeast Company 8,300 pounds of yeast packed in wrappers, made expressly for the "Acme Yeast Company," a name under which he did business by virtue of a certificate, taken out for him by a cousin. Many of these wrappers

were found at several of the stills. The case against John Nole depended upon the assistance which he gave his brother, Nicholas, and upon his being distributor for the National Grain Yeast Company for Utica during the years 1937 and 1938, a number of whose wrappers were found at the stills. Again we shall assume that the Noles knew that Nicholas's customers were illicit distillers.

In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime. That came up a number of times in circuit courts of appeal while the Eighteenth Amendment was in force, and the answer was not entirely uniform. The first case we have found is Pattis v. United States, 17 Fed. (2) 562 (C. C. A. 9), where, although the accused appears to have been in fact more closely connected with the buyer's crime than merely as a seller, the court affirmed a charge to the jury that he was guilty if he merely had notice of the future destination of the goods. That appears to be the settled doctrine in that circuit. Vukich v. United States, 28 Fed. (2) 666, 669; Borgia v. United States, 78 Fed. (2) 550, 555. The same is true of the Seventh Circuit. Anstess v. United States, 22 Fed. (2) 594; Hubinger Company v. United States, 64 Fed. (2) 772. And of the Sixth. Rudner v. United States, 281 Fed. 516, 418 520. The Fifth has, however, held otherwise, though by a divided court, Young v. United States, 48 Fed. (2) 26. In that case the judges differed because of their interpretation of Edenfield v. United States, 273 U. S. 660, which, on the authority of United States v. Katz, 271 U. S. 354, reversed a conviction upon a count for conspiracy to manufacture liquor without a license. The indictment also contained a count for conspiracy to manufacture liquor contrary to the National Prohibition Law, and the conviction on this the court did not disturb; the question was whether in doing so it had held that the mere sale of materials for making a still, and of sugar and meal to make liquor, was enough to convict. The opinion below (Edenfield v. United States, 8 Fed. (2) 614) indicated that there had been nothing more to hold the seller, but when the same court in Young v. United States, supra, (48 Fed. (2) 26), came to consider the effect of the reversal, the majority said that there had in fact been much more; i. e., that the accused had taken part in setting up the stills, and in selling the liquor after it was made. We do not think, therefore, that Edenfield v. United States, supra, (273 U. S. 660), should be regarded as passing upon the point. We are ourselves committed to the view of the Fifth Circuit. United States v. Peoni, 100 Fed. (2) 401. In that case we tried to trace down the doctrine as to abetting and conspiracy, as it

exists in our criminal law, and concluded that the seller's knowledge was not alone enough. Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. If they do, he must excuse his conduct by showing that the interest which he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss, and the only question is whether the law shall transfer it from the sufferer to another.

419 There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills. State ex rel. Dooley v. Coleman, 126 Fla. 203, accords with this view.

For these reasons the prosecution did not make out a case against either of the Falcones, Alberico, or John Nole; and this is especially true of Salvatore Falcone. As to Nicholas Nole the question is closer, for when he began to do business as the "Acme Yeast Company", he hid behind the name of a cousin, whom he caused to swear falsely that the affiant was to do the business. Yet it seems to us that this was as likely to have come from a belief that it was a crime to sell the yeast and the cans to distillers as from being in fact any further involved in their business. It showed a desire to escape detection, and that was evidence of a consciousness of guilt, but the consciousness may have as well arisen from a mistake of law as from a purpose to do what

420 the law in fact forbade. We think therefore that even as to him no case was made out.

We need consider only three of the four points raised by Soldano, Graniero, and Grimaldi. The first is that the judge allowed some of the other accused to plead guilty in the presence of the jury. The argument is that in doing so, these confessed

that they had been parties to a conspiracy, and thus supplied a link in the evidence necessary to convict the appellants, without the sanction of an oath, or the protection of cross-examination. The same objection has been several times raised, and always, so far as we have found, without success. Grunberg v. United States, 145 Fed. 81, 86 (C. C. A. 1); Schliefer v. United States, 288 Fed. 368 (C. C. A. 2); Rollnick v. United States, 91 Fed. (2) 911, 917 (C. C. A. 2). In the case at bar it does not appear whether the appellants objected at the time, and furthermore in his charge the judge told the jury to disregard the incident. On any theory the chance that harm was done seems to us fanciful; the existence of some kind of conspiracy was proved beyond peradventure, and the only important issue was whether these appellants were connected with the enterprise.

The second point is that some of the evidence was seized upon a defective search warrant, the defect being that the place to be searched was described as a "Dwelling house, No. 1166 Webster Avenue," without adding that it was in Utica, New York. The warrant is not in the record and we do not know where it was issued; if in Utica, the point is utterly immaterial; and even if it was issued elsewhere, the omission was not vital. A warrant must indeed be specific enough not to allow the officers latitude to search at their choice; but the chance that there might be two dwelling houses at the same street and number in different cities, was so remote as to be negligible. All that is required is
421 reasonable certainty of identification. Steele v. United States, No. 1, 267 U. S. 498, 503; Chiaravalloti v. United States, 60 Fed. (2) 192 (C. C. A. 7); Rose v. United States, 45 Fed. (2) 459 (C. C. A. 8).

The last point is the admission of evidence of the existence of illicit stills with which the appellants were not shown to have been connected, and the judge's instruction to the jury that this bore upon the existence of the conspiracy, even though all the conspirators had not personally been connected with those particular stills. The prosecution was trying to prove that the twenty-two stills were being operated in concert; it would be most unlikely that all the conspirators would be operating every still; there would be a division of labor in this, as in lawful enterprises. Even though all the stills were not shown to have been run under a single scheme, it would not be fatal to the prosecution; at worst it would be only a variance, and that not a material one, for there was some concerted scheme, and if the prosecution failed to prove that it had spread as far as the indictment alleged, it did not matter. It is quite true that there was a danger that the existence of so much illicit distilling might predispose the jury to assume that all the accused were connected with it; but that was unavoidable if the prosecution was to be

allowed to try to prove the scheme as alleged. It might be held as it used to be, that variances were material just because of that danger, but today courts are disposed more to rely upon the ability of a jury to distinguish between those who are in fact involved in the crime, and those who are not; and there can be little doubt that in the long run this latitude promotes the administration of justice.

The convictions of Salvatore and Joseph Falcone, of Alberico and of Nicholas and John Nole are reversed. The convictions of Soldano, Grimaldi, and Graniero are affirmed.

422 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT, APPELLEE,

vs.

LAWRENCE GRIMALDI, DEFENDANT, APPELLANT

Petition for rehearing

The above named Appellant, feeling himself aggrieved by the decision and opinion rendered in this appeal on February 13, 1940, respectfully petitions the United States Circuit Court of Appeals for the Second Circuit for a rehearing of his appeal herein, on the following grounds:

First—As shown by the Certificate of the Trial Judge (attached to the Motion to Correct Record on Appeal herein):

"On the 9th day of June, 1939, Elmer Pflanz, one of the defendants on trial, in the presence and hearing of the jury, was allowed to withdraw his plea of not guilty to conspiracy as charged in the indictment and to plead guilty to said charge. Thereupon, Mr. Baxter, as attorney for Lawrence Grimaldi, a co-defendant, objected to such proceeding on the ground that the jury was thereby unlawfully informed that, in the opinion of the defendant Pflanz at least, there was a conspiracy as charged in the indictment and that said Pflanz was a member of said con-

423 spiracy, greatly to the prejudice of the other defendants remaining on trial; and moved for a mistrial and the discharge of the jury on the ground that defendants could no longer obtain a fair trial before that jury. The court overruled the objection, and denied the motion, and due exception was taken."

The argument on appeal is that he thereby unlawfully told the jury that he had been a party to, not merely "a conspiracy," but the particular conspiracy which was the sole charge in this indictment. The fault is not merely the lack of an oath, or opportunity for cross-examination; but, he told the jury his opinion or conclusion, not a fact within his knowledge; and,

by permitting the procedure, the prosecuting attorney and the trial court gave the jury their expert opinions to the same effect. The lack of expert qualification among some of the defendants in this case is aptly noted by the Appellate Court in its Opinion herein.

The cases cited by the Opinion, to indicate that such procedure is not prejudicial, are not in point. In those cases the procedure was rendered harmless by the co-defendant, who pleaded guilty before the jury, afterwards taking the stand as a witness and testifying to facts which justified the procedure. But, in the instant case there was an entire lack of any justifying evidence.

In its Opinion the Appellate Court aptly defines Conspiracy as a Partnership in an unlawful enterprise. This particular appellant, as shown by the evidence, had no partner in either of his unlawful enterprises. In its brief (p. 9) the prosecution alleges that all the unlawful acts in relation to his stills were done by Grimaldi, alone. He was actually innocent of the crime charged, as shown by the very facts alleged against him by the prosecution.

424 Second—The search warrant referred to in this point is admittedly defective. A certified copy of it was offered and received in evidence (fol. 232), and printed as Defendants' Exhibit D (R. 237). The opinion states "The defect being that the place to be searched was described as a 'Dwelling house, No. 1166 Webster Avenue,' without adding that it was in Utica, New York."

The question is, does this defective description of the place to be searched render the warrant void? Of course, the defect might have been cured as suggested by the opinion (supra). But actually it was neither so, nor otherwise, cured. Is the name "Webster Avenue" so unusual for a city street that the chance of more than one city having a street so named is "negligible"? Or that another city street so named might not have a dwelling house thereon numbered 1166? If such a combination could happen only in Utica, N. Y., the defect would still be fatal; because of its danger as a precedent. Other warrants might describe the place to be searched by street and number only, and use a more common name of street and number of dwelling such as "No. 6 Second Street." Would this meet the constitutional requirement for "Particularly describing the place to be searched"?

Third—The last point is not merely "The admission of evidence of the existence of illicit stills with which the appellants were not shown to have been connected, and the judges instructions to the jury that this bore upon the existence of the conspiracy, even though all conspirators had not personally been connected with those particular stills." The point is, the admission of evidence of the existence of illicit stills with which

425 any of the defendants were not shown to have been connected; and the judge's instruction to the jury that "The testimony regarding each still seizure, even though it does not connect any or only one or two defendants therewith, bears upon the question of the existence, or non-existence of a conspiracy." (R. 178.) The illegal and harmful part of the charge was not merely "that this bore upon the existence of the conspiracy, even though all conspirators had not personally been connected with those particular stills"; but was particularly, "Even though it does not connect any or only one or two defendants therewith."

Because the Appellant, Grimaldi, is actually innocent of the crime of which he was convicted, he earnestly prays this Honorable Court for a rehearing of his appeal; to the end that substantial justice may be done in his case.

Respectfully submitted,

IRVING K. BAXTER,
Attorney for Lawrence Grimaldi,
115 Genesee St., Utica, N. Y.

I hereby certify that the foregoing petition for rehearing is made in good faith, in the belief that the petitioner is lawfully entitled to the relief prayed for, and that the petition is not made for the purpose of delay.

IRVING K. BAXTER,
Attorney for Appellant-Petitioner, Grimaldi,
Office and Post Office Address, 115 Genesee Street, Utica, N. Y.

Dated Utica, N. Y., February 27, 1940.

426 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

vs.

SALVATORE FALCONE, ET AL., DEFENDANTS-APPELLANTS

Judgment

Filed March 4, 1940

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the convictions of Salvatore and Joseph Falcone,

of Alberico and of Nicholas and John Nole are reversed, and the convictions of Soldanò, Grimaldi, and Graniero are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, *Clerk.*

427 [File endorsement omitted.]

428 In United States Circuit Court of Appeals, for the Second Circuit

UNITED STATES OF AMERICA, APPELLEE

vs.

LAWRENCE GRIMALDI, APPELLANT

Before L. HAND, CHASE, and CLARK, Circuit Judges. Irving K. Baxter for appellant.

Per Curiam:

Petition for rehearing denied.

L. H.
H. B. C.
C. E. C.
Circuit Judges.

Filed Mar. 13, 1940.

429 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAWRENCE GRIMALDI, DEFENDANT-APPELLANT

Order denying petition for rehearing

Filed March 13, 1940

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

D. E. ROBERTS, *Clerk.*

430 [File endorsement omitted.]

431 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Order allowing certiorari

Filed May 20, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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220851—40

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 868

UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE AND JOHN NOLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 4, 1940, reversing the convictions of the respondents in the District Court of the United States for the Northern District of New York.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 234–239) is reported in 109 F. (2d) 579.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the convictions of the respondents was entered March 4, 1940 (R. 241–242).[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the internal revenue laws may properly be convicted as a coconspirator.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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[1] In addition to the respondents, three other defendants appealed to the Circuit Court of Appeals. Their convictions were affirmed by that court (R. 242). One of them filed a petition for a rehearing (R. 239) which was denied (R. 242).

STATEMENT

On October 26, 1938 (R. 18), the respondents were indicted, with sixty-three other defendants, in the District Court for the Northern District of New York. The indictment, in one count, charged a conspiracy to violate the internal revenue liquor laws through the operation of illicit stills. Twenty-five overt acts were alleged (R. 7–16).

At the conclusion of the Government's case and again at the conclusion of the entire case the respondents moved to dismiss the indictment on the ground that the evidence was insufficient to establish a case against them. These motions were denied and exceptions taken (R. 77–85, 102–104). Of the twenty-four defendants on trial, the respondents and sixteen other defendants were convicted (R. 189).

The following sentences were imposed upon the respondents: Salvatore Falcone, one year and five months' imprisonment and a $6,000 fine (R. 117); Joseph Falcone, two years' imprisonment and a $7,500 fine (R. 117); Henry Alberico, one year and one day's imprisonment and a $3,000 fine (R. 117); Nicholas Nole, two years' imprisonment (R. 118); and John Nole, one year and five months' imprisonment and a $2,000 fine (R. 118). On appeal by the respondents and three other defendants to the Circuit Court of Appeals for the Second Circuit, that court reversed the convictions of the

respondents and affirmed the convictions of the other defendants (R. 241–242).

For the purposes of this petition the evidence is sufficiently summarized in the opinion of the Circuit Court of Appeals (R. 234–236, 237). This summary discloses that during the years 1937 and 1938 some twenty-two illicit stills were being operated in and around the City of Utica, New York; that these stills were in each case operated after the same pattern; and that the appellants in the Circuit Court of Appeals were divisible into two groups: a group of three who were the actual distillers, and a second group consisting of the respondents, who supplied the illicit distillers with sugar, yeast and cans. The Circuit Court of Appeals found that there was ample evidence as to the guilt of the still operators, but after reviewing the evidence in some detail with reference to each of the five respondents, concluded that the Government did not make out a case against any of them. While the court assumed for the purpose of its decision that the evidence was sufficient to establish that Salvatore and Joseph Falcone had knowledge that their customers were supplying the illicit distillers with the sugar sold by the Falcones (although the court expressed some doubt that Salvatore Falcone knew of the eventual destination of the sugar) and while the court also assumed that the evidence was sufficient to establish that Alberico and John and Nicholas Nole had knowledge that the persons to

whom they sold sugar, yeast and cans were the operators of illicit stills (R. 235–236),[2] it held as a matter of law that "the seller of goods, in themselves innocent, [does not become] a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime." (R. 236.) It stated that in order to hold a defendant criminally responsible as a conspirator or abettor "he must in some sense promote [the illegal] venture himself, make it his own, have a stake in its outcome," and that selling to illicit distillers with knowledge is "*toto coelo* different from joining with them in running the stills" (R. 237).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, as a matter of law, that one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the in-

[2] In view of these assumptions by the Circuit Court of Appeals as to the knowledge of the respondents there is, of course, no occasion to review the evidence for the purpose of determining whether it established that the various respondents, in fact, had knowledge. If the rule of law enunciated by the court below is incorrect, as the Government contends, the case should be remanded to that court for a determination by it of the sufficiency of the evidence to establish the knowledge of each respondent.

ternal revenue laws may not properly be convicted as a coconspirator.

2. In holding, as a matter of law, that one who sells materials with knowledge that they will be used in the operation of illicit stills pursuant to a conspiracy is not criminally responsible as a coconspirator unless he otherwise promotes the unlawful venture by joining in the operation of the stills, by making the venture his own, or by having a stake in its outcome.

3. In holding that the conviction of the respondents as members of the conspiracy charged in the indictment was improper.

4. In reversing, as to respondents, the judgments of conviction in the District Court.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in its opinion (R. 236) expressly recognized that its decision was in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Pattis* v. *United States,* 17 F. (2d) 562, certiorari denied, 274 U. S. 750, *Vukich* v. *United States,* 28 F. (2d) 666, certiorari denied, 279 U. S. 847, and *Borgia* v. *United States,* 78 F. (2d) 550, certiorari denied, 296 U. S. 615; the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Anstess* v. *United States,* 22 F. (2d) 594, and *Hubinger Co.* [*Zito*] v. *United States,* 64 F. (2d) 772; and the decision of the Circuit Court of Appeals for the Sixth Circuit

in *Rudner* v. *United States*, 281 Fed. 516, certiorari denied, 260 U. S. 734. The court deemed its decision to be supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Young* v. *United States*, 48 F. (2d) 26 (R. 236).

The decision of the court below appears also to be in conflict with those decisions holding that a lessor may be held as an accessory or a conspirator if he fails to evict a lessee after he has acquired knowledge that the lessee is using the leased premises for the operation of illicit stills or the illegal sale of liquor. *Reynolds* v. *United States*, 282 Fed. 256 (C. C. A. 6th); *Steir* v. *United States*, 2 F. (2d) 149 (C. C. A. 1st); *Brady* v. *United States*, 41 F. (2d) 449 (C. C. A. 7th); *Cardinal* v. *United States*, 50 F. (2d) 166 (C. C. A. 8th). Compare the contrary holding of the court below in *United States* v. *Dellaro*, 99 F. (2d) 781.

2. The question of law presented by the decision below obviously should be settled by this Court. In addition to its bearing upon the general law of conspiracy, it is of particular importance to the Government in the enforcement of the internal revenue liquor statutes. Plainly, one of the most effective methods of combating the production of illicit liquors is to strike, when possible, at those who supply the distiller with the necessary materials. But if the decision of the court below and that of the Circuit Court of Appeals for the Fifth Circuit of similar import, heretofore referred to, are per-

mitted to stand, the result will be that in those circuits a person may, with impunity, knowingly act as a source of supply for illicit distillers so long as his activities go no further.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

APRIL 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 42

THE UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE, AND JOHN NOLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 234–239) is reported in 109 F. (2d) 579.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the convictions of the respondents was entered March 4, 1940 (R. 241–242). The petition for writ of certiorari was filed April 3, 1940, and was granted May 20, 1940 (R. 243). The jurisdiction of this Court is conferred by Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether one who knows of the existence of a conspiracy to produce distilled spirits in violation of the internal revenue laws, and knowingly provides essential materials by selling them to the conspirators or to their immediate vendors, may be convicted as a coconspirator.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procurs its commission, is a principal.

STATEMENT

On October 26, 1938, the five respondents were indicted with sixty-three other defendants in the Northern District of New York (R. 18). The indictment charged, in one count, a conspiracy to violate the internal revenue laws by the operation of twenty-two illicit stills in and near Utica, New York, during a long period prior to October 1938 (R. 7–16). A number of defendants pleaded guilty (R. 20) and the indictment was dismissed as to many others (R. 21). The case was submitted to the jury as to twenty-four defendants; three were acquitted; the respondents and sixteen others convicted (R. 116). The following sentences were imposed upon the respondents: Salvatore Falcone, one year and five months' imprisonment and a $6,000 fine (R. 117); Joseph Falcone, two years' imprisonment and a $7,500 fine (R. 117); Henry Alberico, one year and one day's imprisonment and a $3,000 fine (R. 117); Nicholas Nole, two years' imprisonment (R. 118); and John Nole, one year and five months' imprisonment and a $2,000 fine (R. 118).

On appeal by the respondents and three other defendants, the Circuit Court of Appeals for the Second Circuit reversed the convictions of the respondents and affirmed the convictions of the others (R 241–242). With respect to the latter, who "were all operators of one or more stills," the Court held that the evidence that they were members of a conspiracy to produce illicit liquor "was

ample" (R. 234).[1] But with respect to respondents the evidence was held to be insufficient[2] under the substantive rule of liability which the Circuit Court of Appeals laid down.

The case against the respondents rested upon the following evidence:

Alberico was a member of the firm of Alberico & Funicello, wholesale grocers in Utica (R. 74–76), who dealt in sugar and five-gallon cans, among other things. Morreale, one of the convicted defendants, who was proved to have been a distiller, bought sugar and cans at Alberico's store on at least eight occasions (R. 53). In a conversation with Alberico, Morreale said, "You could have trusted me for sugar this morning," and Alberico replied, "I can't trust you because your business is too risky" (R. 52–53). At one of the stills Government officers found 55 cardboard cartons, each sufficient to contain one dozen five-gallon cans. On one of them was stenciled: "Alberico & Funicello, Utica, New York, from the Atlas Can Company, Brooklyn" (R. 39), a firm from which Alberico bought cans (R. 73). Alberico's purchases of sugar, as the court below said, "varied with the

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[1] One of these defendants filed a petition for rehearing (R. 239), which was denied (R. 242).

[2] At the conclusion of the Government's case and again at the conclusion of the entire case the respondents moved to dismiss the indictment on the ground that the evidence was insufficient to establish a case against them. These motions were denied and exceptions taken (R. 77–85, 102–104.)

activity of the stills" (R. 235). Thus, of a total of 974,300 pounds of sugar bought in 1937, about 600,000 pounds were bought during January, February, March, and the first week in April (R. 140), when several of the stills were in operation (R. 36–39). After three stills were raided on April 10 and 14 (R. 37–38) no more sugar was bought that month. During the following summer purchases ranged from 12,500 to 40,000 pounds per month but they rose to almost 90,000 pounds in September (R. 140) when new stills started work (Exh. 50, R. 34). Alberico's sugar was purchased from Joseph Falcone, Bonomo, a customer of Falcone, and two jobbers (R. 140).

Joseph and Salvatore Falcone were brothers who had been partners in various enterprises since 1932, including the wholesale grocery business (R. 95). In March, April, June and September of 1937, Joseph Falcone dealt in sugar, purchasing 860,000 pounds during this period (Exhs. 446–447, R. 139). Neither he nor Salvatore Falcone dealt in sugar at any other time (R. 95–97). He had only three customers: Alberico, Bonomo, who sold to Alberico, and Pauline Aiello (R. 149–154). As the court below noted (R. 235), his purchases, like those of Alberico, fluctuated with the activities of the illicit stills.[3] An investigator observed the re-

[3] Thus Joseph placed an order for 2,000 bags of sugar on April 8, 1937, to be delivered in two installments each of 1,000 bags on April 12 and 19 (R. 74, Exh. Q, R. 148). On April 10 one still was raided and on April 14 two more

ARGUMENT

ONE WHO KNOWS OF THE EXISTENCE OF A CRIMINAL CONSPIRACY AND KNOWINGLY PROVIDES MATERIALS WITH WHICH THE CONSPIRACY IS CARRIED ON IS GUILTY OF THE CRIME OF CONSPIRACY

The Government contends that the present case turns ultimately on the nature of accessorial assistance and that the decision of the court below conflicts with established principles of liability for such assistance.

It is well settled that one who knows of the existence of a criminal conspiracy and knowingly aids in effectuating any of its objects is responsible as a coconspirator and that it is immaterial whether the aid is rendered by acts otherwise innocent [6] or culpable.[7] The validity of this rule of criminal liability does not depend on the sufficiency of the acts of assistance to evidence an actual agreement

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[6] *Simpson* v. *United States*, 11 F. (2d) 591 (C. C. A. 4th), certiorari denied, 271 U. S. 674 (loan of a car to transport liquor); *Pattis* v. *United States*, 17 F. (2d) 562 (C. C. A. 9th), certiorari denied, 274 U. S. 750 (sale of raw materials); *Hubinger Company* v. *United States*, 64 F. (2d) 772 (C. C. A. 7th) (same); *Borgia* v. *United States*, 78 F. (2d) 550 (C. C. A. 9th), certiorari denied, 296 U. S. 615 (same); *Marino* v. *United States*, 91 F. (2d) 691 (C. C. A. 9th), certiorari denied, 302 U. S. 764 (permission to use premises for storage and re-canning of alcohol).

[7] *Rudner* v. *United States*, 281 Fed. 516 (C. C. A. 6th), certiorari denied, 260 U. S. 734; *Anstess* v. *United States*, 22 F. (2d) 594 (C. C. A. 7th); *Comeriato* v. *United States*, 58 F. (2d) 557 (C. C. A. 4th), certiorari denied, 286 U. S. 566; *Robinson* v. *United States*, 94 F. (2d) 752 (C. C. A. 5th), all of which involved the unlawful sale of liquor.

or combination to achieve the ulterior criminal end. It rests on the narrow ground, infrequently expressed,[8] that under the rule embodied in Section 332 of the Criminal Code (U. S. C., Title 18, Section 550) whoever "aids, abets, counsels, commands, induces, or procures" the commission of an offense against the United States is guilty of that offense as a principal.[9] When the offense thus aided is criminal conspiracy, the person who knowingly aids is guilty of conspiracy. Conspiracy is not only one of the bases of complicity in other crimes; it is a substantive crime itself.

Hence it is only in the case where a conviction of conspiracy rests on proof of knowingly assisting an *individual* in the furtherance of an unlawful purpose that the act of assistance must itself import that agreement or concert of action (*Gebardi* v. *United States*, 287 U. S. 112, 121) without which no conspiracy exists. For there is then no existing conspiracy to which the defendant becomes a

[8] But see *Cardinal* v. *United States*, 50 F. (2d) 166, 168, 169–170 (C. C. A. 8th); *Borgia* v. *United States*, 78 F. (2d) 550 (C. C. A. 9th), certiorari denied, 296 U. S. 615; *Marino* v. *United States*, 91 F. (2d) 691 (C. C. A. 9th), certiorari denied, 302 U. S. 764. That Section 332 is not more frequently mentioned in conspiracy cases is adequately explained by the fact that conspiracies always involve multiple parties and the law of accessorial liability has therefore inevitably become an integral part of the law of conspiracy.

[9] It is well settled that persons liable under this section may be indicted as principals. *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; *Greenberg* v. *United States*, 297 Fed. 45 (C. C. A. 8th); *O'Brien* v. *United States*, 25 F. (2d) 90 (C. C. A. 7th).

finer's date marks on two bags (R. 70) of a batch sold to Bonomo and delivered on September 15, under Joseph's own supervision (R. 66). Bags bearing one of the marks were found at a still raided September 30 (R. 40) and another raided January 17 (R. 43).[4] The sugar sold by Joseph to Bonomo and by Bonomo to Alberico changed hands at prices 35 to 50 cents per bag above those at which Alberico was then buying sugar elsewhere (R. 149–152, 140), although the average resale profit was only 10 to 15 cents a bag (R. 76). Moreover, at the time of his sugar transactions Joseph associated with two of the conspirators, John Melito (R. 66, 68) and Grimaldi (R. 66), who were distillers. For Grimaldi, who was Salvatore's brother-in-law (R. 69), he also had endorsed a note (R. 97). He frequented the restaurant at which many of the conspirators met (R. 55, 42) and associated with Sam Grio, its proprietor (R. 66).

Salvatore Falcone was closely related to Joseph in the conduct of the sugar business, as he had been in previous ventures (R. 95). Each held a power of attorney on the other's bank accounts (Exhs.

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were raided (R. 37–38). Delivery of the first 1,000 bags was postponed to April 25, and the second 1,000 canceled (R. 74). Another order for 1,000 bags was placed on September 10 (Exh. 446, R. 139), two days after arrangements had been made for water service to a new still (Exh. 50, R. 34).

[4] The record states January 17, 1939. This is an obvious typographical error. The year is 1938, as the chronological sequence of the reports (R. 31–52) makes clear.

398–399, R. 124–126). Salvatore drew two checks on Joseph's account bearing on their face the notation that they were in payment for sugar (Exhs. 407, 410, R. 127–128). Salvatore was present at the home of John Melito, one of the convicted distillers, along with Joseph and Grio (R. 67).

Nicholas Nole was the proprietor of Acme Yeast Company, whose proprietorship he falsely registered in the name of a cousin who had no part in the business (R. 73). Acme Yeast wrappers, which had been provided by Nicholas Nole himself (R. 73) were found at one of the stills (R. 42). Nicholas Nole was also the proprietor of "Utica Freight Forwarding Company," the addressee of a consignment of one and one-half tons of "K & M" imported keg yeast (R. 73), a brand found at some of the stills (R. 46, 49); the order for this consignment of yeast had been placed in the name of an unidentified person (R. 73). There was evidence of association of Nicholas Nole with several of the convicted distillers, including Melito (R. 55, 64–65, 68), during the summer and fall of 1937, the period of operation of at least one of the above stills (R. 217). On one occasion during the period of these associations, Nicholas Nole sold and delivered illicit alcohol from a source not stated (R. 56).

John Nole was a distributor for National Grain Yeast Company in the Utica area during the years 1937 and 1938 (R. 62–63) when yeast wrappers bearing the National label were found at three of

the raided stills (R. 35, 40, 44). There was evidence that he assisted his brother Nicholas at Utica Freight Forwarding Company in unloading keg yeast there (R. 64), that he frequented Grio's restaurant (R. 55) and was present with the convicted conspirator Morreale, a distiller, when Morreale obtained keg and carton yeast from a store in Utica; and that on one such occasion he ordered the person in the store to let Morreale have the yeast (R. 54). John Nole's information returns on yeast, furnished to National Grain Yeast Company and furnished by the company in turn to the Government, showed no yeast whatsoever sold to Morreale nor any sales of yeast in kegs (R. 63).

The Circuit Court of Appeals apparently held that the evidence was insufficient to permit a jury to find that any of the respondents were parties to the actual plan to distill illicit spirits and considered whether they were nevertheless responsible, as a matter of law, if they sold materials with knowledge that they were supplying the unlawful venture.[5] The court held that the evidence was sufficient to establish such knowing sales by the respondent Alberico and assumed that it was sufficient with respect to the other respondents as well, although doubt was specifically expressed in the

[5] The trial court charged (R. 104–112), in the usual form, that a defendant was guilty if he planned with others to produce spirits in violation of the internal revenue laws or if, knowing of the existence of such a plan, he did any act, though innocent in itself, to further its execution (R. 107, 108, 111).

case of Salvatore Falcone. The decision was that evidence of knowing sale to the members of a conspiracy is legally insufficient to establish responsibility for the buyers' crime. Stating the question as "whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime" (R. 236), the Court said "that the seller's knowledge was not alone enough"; that it "is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome"; "that morally the defendants at bar should have refused to sell illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills" (R. 237).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, as a matter of law, that one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the internal revenue laws may not properly be convicted as a conspirator.

2. In holding, as a matter of law, that one who sells materials with knowledge that they will be used in the operation of illicit stills pursuant to a conspiracy is not criminally responsible as a co-conspirator unless he otherwise promotes the unlawful venture by joining in the operation of the stills, by making the venture his own, or by having a stake in its outcome.

3. In holding that the conviction of the respondents as members of the conspiracy charged in the indictment was improper.

4. In reversing, as to respondents, the judgments of conviction in the District Court.

SUMMARY OF ARGUMENT

It is well settled that one who knows of the existence of a criminal conspiracy and knowingly aids in effectuating any of its objects is guilty of conspiracy; and that it is immaterial whether the aid is rendered by acts otherwise innocent or culpable. This rule is based upon the rule embodied in Section 332 of the Criminal Code that one who assists in the commission of a crime becomes a party to the crime. If the crime assisted is conspiracy, he is guilty of conspiracy. The ultimate issue in the present case is, therefore, whether the sale of materials with knowledge that they will be used by the buyer to commit a crime "aids" in the commission of the buyer's crime within the meaning of Section 332. The decision of the court below holds, in effect, that they do not—unless the

seller is motivated by a desire to further the buyers' criminal purpose. This subjective qualification of the scope of accessorial liability is contrary to the authorities in the other circuits and has no support in the considerations which underlie the punishment of accessorial assistance.

The Government does not deny that such assistance must be intentional for criminal responsibility to attach. But it is familiar law that for most of the purposes of criminal liability a consequence is intended when the actor knows that it will follow from his act. The presence or absence of a "stake" in the success of the enterprise assisted is relevant only as evidence of the defendant's knowledge of its criminal nature.

The rule of liability for which the Government contends does not require conviction of all persons who knowingly render assistance which is trivial or immaterial. On the evidence in the present case and the assumptions of fact made by the court below there were repeated instances of knowing sales evidencing an interest in the continuity of the criminal enterprise. Nor does the rule of liability urged by the Government deny that some degree of knowing assistance may in special circumstances be justified. But the decision of the court below confers a broad and unwarranted immunity upon men who knowingly facilitate the commission of crimes. The fact that conspiracy prosecutions may sometimes be abused does not justify this result.

party by virtue of Section 332; and liability under that section attaches only for the substantive offense if it is committed by the person assisted.[10] This qualification is, however, immaterial in the present case. The only view of the assumptions of fact made by the Circuit Court of Appeals which is reasonable in the light of the record is that the respondents knew that directly or indirectly they were selling to persons who were themselves engaged in a conspiracy to produce illicit spirits. The ultimate issue is, therefore, whether the sale of materials with knowledge that they will be used by the buyer to commit a crime "aids" in the commission of the buyer's crime within the meaning of § 332. The issue turns not on the nature of conspiracy but on the nature of accessorial assistance.[11]

Under the decision below the sale of materials essential to the commission of a crime with knowledge that they will be used by the buyers for criminal purposes does not constitute accessorial assistance; the seller must in addition "in some sense promote their venture, himself, make it his own,

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[10] Cf. *Louie* v. *United States*, 218 Fed. 36 (C. C. A. 9th); *Di Bonaventura* v. *United States*, 15 F. (2d) 494, 496 (C. C. A. 4th).

[11] The court below postulated a complete equivalence between the conspiratorial and the accessorial relationships both in the instant case (R. 236) and in its earlier decision in *United States* v. *Peoni*, 100 F. (2d) 401, 403. Though the relationships frequently overlap, this equivalence is, in the Government's view, overstated.

have a stake in its outcome." The meaning of this additional requirement is more fully explained in the court's earlier opinion in *United States* v. *Peoni,* 100 F. (2d) 401, cited as controlling authority in the present case. There, after discussing various formulations of the definition of an accessory, including that embodied in Section 332 of the Criminal Code, the court said: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself w h the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude toward it" (p. 402). The essence of the rule declared by the court below is, therefore, that however extensive the defendant's knowledge of the existence of a criminal enterprise, however fully he knows that his action will further its purpose, and however essential the assistance which he actually renders, he is not responsible as an accessory unless, in addition, his action is motivated by a wish to further the criminal purpose. The rule of liability thus enunciated by the court below is contrary to the great weight of authority and has no support in the considerations which underlie the punishment of accessorial assistance.

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First: Many decisions hold, as the opinion below concedes, that one who supplies materials for the commission of a crime with knowledge of their intended use, "aids" in the commission of the crime and is guilty as an accessory. No distinction has been drawn between aiding conspiracy and aiding other crimes. The rule has been applied without hesitation to acts otherwise innocent,[12] such as the sale of raw material in the instant case, or the rental of real property with knowledge that it will be used for distilling, smuggling, prostitution, or counterfeiting.[13] As the court said in *Vukich* v. *United States,* 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847: "The business of a distillery cannot be carried on without supplies. It follows that one who knowingly delivers supplies to such distillery aids and abets the carrying on of its unlawful business, and thus becomes, under the provisions of the statute [Criminal Code, Section 332], liable to be prosecuted and punished as a principal." This view of the law may indeed have been accepted by this Court in its *per curiam* decision in *Edenfield* v. *United States,* 273 U. S. 660, though for reasons

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[12] See *Vukich* v. *United States*, 28 F. (2d) 666 (C. C. A. 9th), certiorari denied, 279 U. S. 847, and the cases cited in note 6, *supra*, p. 12.

[13] *Reynolds* v. *United States*, 282 Fed. 256, 257 (C. C. A. 6th); *Steir* v. *United States*, 2 F. (2d) 149 (C. C. A. 1st); *Brady* v. *United States*, 41 F. (2d) 449 (C. C. A. 7th); *Cardinal* v. *United States*, 50 F. (2d) 166 (C. C. A. 8th).

explained in the margin the Government does not cite the decision as controlling.[14]

In none of the decisions in any of the other circuits is it suggested that a defendant who knowingly renders assistance must do so for the sake of furthering the criminal enterprise rather than

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[14] The case involved three indictments, each containing two counts, the first count charging a conspiracy to manufacture liquor and the second to manufacture liquor without making a permanent record. Edenfield was convicted and sentenced on both counts of the indictment. The trial judge charged, among other things, that the jury could convict upon proof that Edenfield did no more than sell materials with knowledge that they would be used for the illicit production of liquor (R. 72). This portion of the charge was assigned as error, but the conviction was affirmed *in toto* by the Circuit Court of Appeals for the Fifth Circuit (8 F. (2d) 614). On writ of certiorari the Government conceded that the second or recording counts of the indictments could not be sustained in view of the then recent decision in *United States* v. *Katz*, 271 U. S. 354. This Court reversed the conviction on these counts and remanded the case to the District Court for resentencing on the first count of each of the three indictments. But with respect to the first count, the Government argued in this Court, in its brief on the merits, that there was much evidence in the record of agreement and participation by the defendant, in addition to the evidence of sales; and that this additional participation made it unnecessary to consider the sufficiency of the sales themselves. Since the charge of the trial court included, in addition to the challenged portion, a general charge on conspiracy, the Government argued in effect that an error on the issue of knowing sale, if error there was, would not have been prejudicial. It is impossible to tell whether in sustaining the conviction on the first counts this Court rested on the ground that the full charge was correct or on the ground that even if erroneous in part the error would not have warranted reversal in view of the state of the record.

for the achievement of his own immediate ends; or that he must have some stake in the success of the enterprise. It is enough that he knowingly furthers the criminal design. Thus, in *Backun* v. *United States,* 112 F. (2d) 635 (C. C. A. 4th), decided since the decision below, the defendant sold property to one Zucker, knowing it to have been stolen. Zuker transported the property in interstate commerce and both were charged with violating the federal statute punishing such transportation. The conviction was reversed on other grounds, but Backun's responsibility under Section 332 of the Criminal Code was expressly sustained. The illuminating opinion of the court repays attention; it said (p. 637):

> Whether one who sells property to another knowing that the buyer intends to use it for the commission of a felony renders himself criminally liable as aiding and abetting in its commission, is a question as to which there is some conflict of authority. See *United States* v. *Falcone, supra.* It must be remembered, however, that guilt as accessory before the fact has application only in cases of felony; and since it is elementary that every citizen is under moral obligation to prevent the commission of felony, if possible, and has the legal right to use force to prevent its commission and to arrest the perpetrator without warrant, it is difficult to see why, in selling goods which he knows will make its perpetration possible with knowledge that they are to be used for that purpose, he is not aiding and abet-

ting in its commission within any fair meaning of those terms. Undoubtedly he would be guilty, were he to give to the felon the goods which make the perpetration of the felony possible with knowledge that they would be used for that purpose; and we cannot see that his guilt is purged or his breach of social duty excused because he receives a price for them. In either case, he knowingly aids and assists in the perpetration of the felony.

Guilt as an accessory depends, not on "having a stake" in the outcome of crime, as suggested in the *Falcone* case, *supra,* but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between

> such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale. This is the view taken of the matter in a number of well considered cases in the federal courts. * * * It is in harmony with the well settled rule that one who, with knowledge of the existence of a conspiracy, aids in carrying out its unlawful design makes himself a party thereto. *Simpson* v. *United States,* 4 Cir. 11 F. 2d 591.

Not even *Young* v. *United States,* 48 F. (2d) 26 (C. C. A. 5th), upon which the court below relied, sustains the position it took. For in that case the majority of the court expressly pointed out that there was no evidence that the buyers of the materials sold by the defendant were engaged in a criminal conspiracy rather than in the individual manufacture of illicit spirits. If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy; and there was no evidence that he actually conspired with anyone himself. That this is a significant distinction is fully indicated by the opinion of Judge Parker in *Di Bonaventura* v. *United States,* 15 F. (2d) 494, 496 (C. C. A. 4th), a decision which would otherwise be

incompatible with his opinion in *Backun* v. *United States, supra.*[15]

It is also doubtful whether the decision is supported by that of the Court of Criminal Appeals in *Rex* v. *Lomas,* 23 Cox. Cr. Cas. 765, relied on by the court below in the *Peoni* case. Fuller reports of that case (see 9 Crim. App. R. 220; 58 Sol. J. 220; 30 T. L. R. 125; 110 L. T. 239; 78 J. P. 152) make clear that in quashing the burglary conviction of the accused, who had given back to a burglar a jimmy which the burglar had lent him, the court rested upon the ground that while the defendant may have known that the burglar was likely to use the jimmy to commit further crimes, he had no knowledge of his intention to commit the particular burglary for which the accessorial charge was made. Whether or not the vagueness of his knowledge was a proper basis for exculpation, the decision is obviously inapplicable where, as here, the defendants are assumed to have known of the existence of a continuing crime.[16]

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[15] Judge Parker's specific statement that Di Bonaventura had no knowledge of the existence of a conspiracy (15 F. (2d) 494, 496) was, we submit, ignored by the court below in relying on the decision for support in *United States* v. *Dellaro*, 99 F. (2d) 781, in which a judgment convicting a landlord who knew that the leased premises were being put to unlawful use but failed to evict, was set aside.

[16] The only other decisions relied on in the *Peoni* case are *State* v. *Coleman*, 126 Fla. 203, in which the installation of telephone service in a gambling house with knowledge that the telephone was to be used for the transmission of horse-

In what has been said the Government does not deny that accessorial assistance must be "intentional" for criminal responsibility to attach (see *Hicks* v. *United States,* 150 U. S. 442). It is, however, familiar law that for most of the purposes of criminal responsibility a "consequence" is intended when the actor knows that the consequence is highly likely to follow from the act (see *Abrams* v. *United States,* 250 U. S. 616, 621; *United States* v. *Patten,* 226 U. S. 525, 543), and even more clearly, when he knows, as in the present case, that the consequence is substantially certain to follow. See Cook, *Act, Intention and Motive in the Criminal Law,* 26 Yale L. J. 645, 657–658; Perkins, *A Rationale of Mens Rea,* 52 Harv. L. Rev. 905, 911;

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race information for gambling purposes, was held not to constitute accessorial aid to the operators of the house; and *Graves* v. *Johnson,* 179 Mass. 53, a civil suit in which the seller recovered the price of liquor which he knew the buyer intended to resell in a neighboring state where such sale was unlawful, but the seller was indifferent to the buyer's purpose. It is enough to say of these decisions that *State* v. *Coleman* relies solely on *Commonwealth* v. *Western Union Telegraph Co.,* 112 Ky. 355, in which the same result was reached in partial reliance upon the company's statutory obligation as a common carrier to serve all comers under penalty for refusal, and that apart from the presentation of a special problem of justification it is contrary to *State* v. *Scott,* 80 Conn. 317; and, as to the *Graves* case, that the availability of the seller's civil remedy in an action for the price does not depend solely on the criminality or non-criminality of the sale. See Williston, *Contracts,* Sec. 1754; Gellhorn, *Contracts and Public Policy,* 35 Col. L. Rev. 679.

Hall, *The Reckless Motorist,* 31 Journ. Crim. L. & Crim., 133, 134. In the absence of special circumstances, which Mr. Justice Holmes, dissenting, thought to be present in the *Abrams* case, *supra,* he recognized that "the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not" (250 U. S. at 626, 627). See also, Holmes, *The Common Law,* 50 *et seq.* The Government does not contend that accessorial liability exists in the absence of actual knowledge of the existence of a criminal plan which will be furthered by the acts of assistance,[17]

[17] There is thus no point to the statement of the court below (R. 237) that "Civilly, a man's liability extends to any injury which he *should* have apprehended to be *likely* to follow from his acts. If they do, he must excuse his conduct by showing that the interest that he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss and the only question is whether the law shall transfer it from the sufferer to another." [Italics ours.] The Government does not argue that it is enough for accessorial liability that the defendant *should* have known that he was aiding a criminal plan. But with respect to the underlying thought that the case for criminal responsibility is always

but it does contend that when such knowledge exists, assistance is intentionally given and, in the absence of justification, criminal responsibility ensues.

Under the theory of liability for which the Government contends the presence or absence of a "stake" in the success of the criminal enterprise, one of the elements emphasized by the court below, is of no legal significance in itself, though it is of important evidentiary significance in determining whether the defendants in fact knew that their acts rendered assistance in the effectuation of a criminal purpose. But knowledge can obviously be proved in other ways, as the court below of necessity assumed in the present case. If such knowledge exists, the acts of assistance are criminal under Section 332 of the Criminal Code, and if the known criminal enterprise is a conspiracy, the defendant becomes a participant in the conspiracy. It does not necessarily follow that a single act of assistance makes a defendant a participant in the

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weaker than that for civil liability, it is well to contrast the familiar observation of Justice Holmes in comparing civil and criminal negligence: "If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard or at least general negative limits of conduct for the community, in the interest of the safety of all." *Commonwealth* v. *Pierce*, 138 Mass. 165, 176.

conspiracy for all time. Any participant in a conspiracy can put a stop to liability by affirmative withdrawal (cf. *Hyde* v. *United States,* 225 U. S. 347, 368; *Eldredge* v. *United States,* 62 F. (2d) 449, 451 (C. C. A. 10th)), and it may be that in the case of a single act of assistance—without further agreement in the plan—the rigor of the usual rule with respect to withdrawal would be relaxed.

Nor does the rule of liability demand conviction of all those hypothetical people who fix the leaking roof at the still or sell the gambling house one pack of cards, even should those persons know the nature of the enterprise they are assisting. While the decisions relied upon by the Government speak, for the most part, in terms of "any" assistance, this, like all legal formulae, must be construed in a reasonable way. Cases may easily be put in which the degree of assistance rendered is so trivial that court or jury would be warranted in treating it as legally immaterial. The charwoman who, in the ordinary course of her duties, cleans the offices which the conspirators use is not to be held criminally responsible, even if she knows of the criminal plan, merely because it is of some value to the conspirators to have their offices cleaned. Cf. *Jindra* v. *United States,* 69 F. (2d) 429, 431 (C. C. A. 5th). The problem at this stage calls for the same kind of judgment upon matters of degree that is "constantly met in other relations" and "cannot be escaped by the adoption of any artificial

rule" (*Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467, 468). It does not differ in nature from the familiar problems of the law of negligence and proximate causation. In determining the materiality of assistance as in the analysis of causation there are points of "remoteness" beyond which the tracing of responsibility for consequences is unwarranted either because the imposition of liability would impose an undue burden of forebearance or because it would so far transcend common conceptions of culpability that a rule of liability could not actually be enforced. Such problems are more readily solved by the restraint of prosecutors and the common conscience of court and jury than by a definitive rule of law. It is enough that in the present case, on the assumptions of fact made by the Circuit Court of Appeals, the assistance knowingly rendered by the respondents was a significant contribution, indeed, an indispensable contribution, to the fruition of the criminal plan. As this Court said in *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467, *supra,* there is "no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialetic of suggesting doubtful and extreme cases."

Moreover, while the Government contends that a single act of substantial assistance suffices for liability, there was far more in the present case on

the evidence in the record and the assumptions of fact made by the Circuit Court of Appeals. There were repeated sales of sugar, yeast, and cans. Assuming, as the Circuit Court of Appeals did, that the respondents knew that they were supplying the illicit distillers, they must also have known that the purchases made by the distillers constituted a substantial source of their trade. In that event, the respondents had a genuine interest in the continuity of the illegal venture. They could not have been indifferent to the continuous existence of their market unless they were also indifferent to their future profits and the continuation of their own business. That this was not thought to establish a "stake" in the outcome of the criminal enterprise, within the meaning of the rule of liability enunciated by the Circuit Court of Appeals, strikingly illustrates the narrow confines of that rule. Indeed, it is difficult to reconcile the decision on this score with that rendered shortly before by the same court in *United States* v. *Bruno*, 105 F. (2d) 921, reversed on other grounds, 308 U. S. 287. There the defendants convicted of a conspiracy to import, sell, and possess narcotics comprised four groups: The smugglers who made cash sales to the "middlemen," the "middlemen who paid the smugglers and distributed to retailers," the retailers in New York, and the retailers in Louisiana and Texas. Although there was no evidence that either group of retailers knew of the existence of the

other, or that the smugglers knew who the retailers were, the court held that they were all part of a single conspiracy on the ground that they were all "embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole" [18] (p. 922). But the only interest of the smugglers in the activities of the retailers was obviously in the maintenance of a market for the middlemen who, in turn, provided a market for the smugglers.

It may also be observed that the rule of liability for which the Government contends does not deny the possibility that some degree of knowing assistance of a criminal enterprise may be justified on the ground that it serves some overriding public end. Thus, it would not be contended that a doctor who saves the life of a patient whom he knows to be an important member of a criminal conspiracy is responsible for aiding the conspiracy merely because he thus assists in the effectuation of its purposes.[19] Many rules of the criminal law require such tacit qualification to meet the special bases of justification that may be suggested as cases arise.

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[18] This was thought to distinguish the *Bruno* case from *United States* v. *Peoni*, 100 F. (2d) 401, decided shortly before. The *Peoni* case is discussed *infra*, pp. 29–31.

[19] Whether or not his failure to disclose his knowledge would be misprision of felony under Section 146 of the Criminal Code (18 U. S. C., § 251) is a separate problem. See *Neal* v. *United States*, 102 F. (2d) 643 (C. C. A. 8th).

No such problem is presented here. The fact that the respondents' acts were otherwise lawful is not in itself a justification for the reasons so fully pointed out in the *Backun* case, *supra,* and in the other decisions sustaining liability referred to above.

Nor does a decision sustaining liability in the present case necessarily conflict with the earlier decision of the court below in *United States* v. *Peoni, supra,* although the Government does not concede that the decision in that case was correct even on its own facts.[20] There Peoni sold counterfeit money to Regno in the Southern District of New York, and Regno sold it to Dorsey, also in the Southern District. Dorsey was arrested while trying to pass it in the Eastern District. Peoni was indicted for possessing counterfeit money, and for conspiring to possess it in the Eastern District. The court held that Peoni was not an accessory to Dorsey's possession or guilty of conspiring with him. While the decision rested upon the interpretation of Section 332 which the Goverment challenges here, it may be observed that when Peoni sold the bills to Regno he did not assist an existing conspiracy between Regno and Dorsey for no such conspiracy existed or was specifically contemplated at the time of his sale; nor was there any actual agreement between him and Regno that anyone else should be given possession of the bills. He

[20] See the criticism in 48 Yale L. J. 1447.

knew that it was probable to some degree that Regno might sell the bills to another rather than attempt to pass them himself, but the degree of that probability was indeterminate and there was no evidence that Dorsey was in any way known to Peoni. Thus, to hold that Peoni did not assist in the possession of Dorsey—whom he did not know—because he knew that it was probable to some degree that Regno might sell to someone else—is not the same as to hold that respondents did not assist in the crime of the conspirators whom they knew and whose unlawful use they knew to be substantially certain. The specificity of the defendant's knowledge and the degree of probability that the result will ensue are obviously material matters, since it is likely to *some* degree that almost everything that is sold may be put to unlawful use by someone at some future time.

Furthermore, the practical consequence of a decision against liability in the *Peoni* case was only to require that Peoni be prosecuted in the Southern District for his own possession and perhaps for a conspiracy with Regno. The question was not as to the criminality of Peoni's conduct, but only as to the form and place of his prosecution. In determining that question considerations as to the proper place of trial and the policy which underlies the Sixth Amendment may conceivably determine the result. But in the present case the decision against liability determined not the nature of the accusation or the place of the trial but the criminal-

ity or noncriminality of the respondent's acts. Under the decision of the court below, men are free to contribute to the perpetration of crimes by knowingly rendering assistance unless Congress has chosen by specific legislation to proscribe the particular form of assistance in question.

Second: The decision of the court below has no support in the considerations that underlie the punishment of accessorial assistance. The punishment of accessories obviously rests upon the importance for the prevention of crime of deterring acts which facilitate their commission; and further upon the significance of acts of accessorial assistance as evidence of further criminal potentialities of the persons who perform them. Neither consideration supports the qualification of the rule of liabiilty advanced by the court below. The danger that acts of assistance will further the commission of crimes does not depend upon the actor's motive to further the criminal ends or upon his stake in their achievement. It depends upon the degree to which the acts of assistance actually facilitate the commission of the crime.[21] Similarly, the further criminal potentialities of the actor, evidenced by his acts, do not depend solely upon his motives, though his motives may be a relevant factor in estimating their strength; they also depend upon general character shown by the nature of the activities which he knowingly furthers.

[21] The requirement of knowledge, which the Government concedes, affords adequate protection of innocence.

The Circuit Court of Appeals alluded to quite different considerations. In the principal case the court emphasized the importance of its qualified rule of liability "today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree what ever with the main offenders. That there are op portunities of greater oppression in such a doctrine is very plain, and it is only by circumscribing the scope of all of such comprehensive indictments that they can be avoided." (R. 237.) In the *Peoni* case the court referred to the danger that a broad rule of accessorial liability may lead to the trial of an offender "thousands of miles away. The oppression against which the Sixth Amendment is directed could be easily compassed by this device, because if the seller be a real accessory he may be removed to the place of the crime." These may both be genuine problems. See *Gebardi* v. *United States,* 287 U. S. 112, 122, note 7. But if they are, a substantive rule of liability which results in the widespread immunity conferred by the decision below upon persons who knowingly further criminal enterprise is an obviously inappropriate solution. In the first place the rule of liability for which the Government contends does not, as we have said, preclude the exculpation of persons who render trivial or justifiable assistance. In the second place, if the self-restraint of prosecutors does not suffice to avert the oppression of dragnet

prosecutions, there is ample authority both in the trial and in the appellate courts to safeguard the interests of individual defendants by severance and in other ways. In the third place, the issue of venue which this Court squarely faced in *Hyde* v. *United States,* 225 U. S. 347, and resolved by a divided Court ought not to be reopened indirectly by revising the underlying rule of liability. It cannot be emphasized unduly that the problem in situations like the instant case is not whether the defendants shall be tried along with the principal actors in the conspiracy or separately; and not, as in *United States* v. *Peoni, supra,* whether an admittedly criminal act shall be prosecuted in one form and in one place or in another. It is rather whether acts which knowingly further an existing criminal enterprise are open to prosecution at all, in the absence of the special elements made requisite by the decision below.

CONCLUSION

In the foregoing argument the Government has proceeded on the assumption made by the court below that all the respondents were parties to the sales, and that they all acted with knowledge of the unlawful purpose for which the material sold would be used. But the Circuit Court of Appeals has not, with respect to all the respondents, held that the evidence was sufficient to sustain the jury's finding of knowing sale. Whether or not it is suf-

ficient for that purpose involves an appraisal of the evidence with respect to each of the respondents which the Circuit Court of Appeals found it unnecessary to make. Under the circumstances, if this Court should sustain the Government's contention that the Circuit Court of Appeals reversed the convictions in reliance upon an erroneous rule of criminal liability, the Government respectfully submits that the appropriate disposition of the case is for this Court to reverse the judgment of the Circuit Court of Appeals and remand the case to that court for an evaluation of the evidence in accordance with the correct rule of law.[22]

FRANCIS BIDDLE,
Solicitor General.
O. JOHN ROGGE,
Assistant Attorney General.
RAOUL BERGER,
IRWIN LANGBEIN,
HERBERT WECHSLER,
Special Assistants to the Attorney General.
GEORGE F. KNEIP,
W. MARVIN SMITH,
Attorneys.

OCTOBER 1940.

[22] See *Grant* v. *A. B. Leach & Co.*, 280 U. S. 351; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126.

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No. 42

In the

Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE, AND JOHN NOLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SALVATORE FALCONE AND JOSEPH FALCONE.

DANIEL H. PRIOR,
Attorney for Respondents,
Salvatore Falcone and Joseph Falcone,
Albany, New York.

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BRIEF FOR RESPONDENTS, SALVATORE FALCONE AND JOSEPH FALCONE.

JURISDICTION

The United States Circuit Court of Appeals for the Second Circuit by a judgment entered March 4, 1940, reversed a judgment of the United States District Court for the Northern District of New York convicting the respondents of the crime of conspiracy to commit offenses against the United States. This Court on May 20, 1940, granted the Government's petition for certiorari.

OPINION OF COURT BELOW

The opinion of the Circuit Court of Appeals is reported in 109 F. (2d) 579.

QUESTION PRESENTED

Whether the seller of goods, in themselves innocent, becomes a conspirator with or an abettor of the buyer because he knows that the buyer means to use the goods to commit a crime.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), the pertinent part thereof, providing as follows:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550), providing as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

Salvatore Falcone and Joseph Falcone, respondents, were on June 27, 1939, in the United States District Court for the Northern District of New York, convicted of the crime of conspiracy to violate the Internal Revenue laws. The sections of the

United States Code which the indictment charged the conspiracy offended are nine in number and relate to the regulation of the manufacture of distilled spirits. For convenience we may accurately state that the indictment charged a conspiracy to operate stills in violation of the Internal Revenue laws.

Sixty-eight defendants were named in the indictment. Thirteen persons other than the defendants were named as co-conspirators and not indicted. Some of the defendants pleaded guilty, a severence was granted another. Some had not been apprehended at the time of the trial. Some were indicted under fictitious names and were neither apprehended nor identified. Forty-two of the defendants were jointly tried. The case against twenty-four defendants went to the jury. Three were found not guilty and twenty-one were found guilty. Eight of the defendants appealed from the judgment of conviction to the United States Circuit Court of Appeals, Second Circuit. The convictions of three were affirmed and of five, including these respondents, reversed.

Joseph Falcone during the year 1937 was a jobber in sugar, and between March 1, and September 14, purchased through Turner Brothers, sugar brokers, 120 Wall Street, New York City, eighty-six hundred bags of sugar, each of one hundred pounds. (R. 74, Exhs. 446–447.) The purchases were made in various lots during that time.

All of this sugar was disposed of by Joseph Falcone as follows: To F. Bonomo & Co., Wholesale Grocers, Utica, New York, five thousand seven hundred and seven bags (R. 76, Exh. 473); to Pauline Aiello, Wholesale Grocer, Utica, New York, two thousand ninety-two bags Exhs. UU–II, VV); eight hundred bags to Alberico & Funicello, Wholesale Grocers, Utica, New York. (Exhs. VV–I; WW.)

These sales account for all the sugar purchased by Joseph Falcone during 1937 except one bag which was lost in transit. (R. 97.)

No attempt was made by the Government and no proof was offered to show that any sugar was sold by Joseph Falcone to any distiller or was diverted by him to any unlawful purpose.

On September 15, 1937, Joseph Falcone was present near the wholesale grocery company warehouse of Bonomo & Co., while sugar was being delivered to the wholesale warehouse. The truck driver was having a difficult time entering the driveway and Joseph Falcone indicated with his hand whether to go to the right or to the left. (R. 66–67.) An observer saw marks on two bags indicating the date the sugar was packed at the refinery. (R. 70.)

On September 30, 1937, sugar bags bearing these date marks were found at a still and on January 17, 1938, sugar bags were found at another still and among them were bags having the same refinery packing date as one of the bags observed in the truck near Bonomo's wholesale warehouse. (R. 44.)

Salvatore Falcone is a brother of Joseph Falcone. They had been in the wholesale grocery business under the name of S. Falcone & Bro., in the hide and skin business under the name of Valley Hide & Skin Company, and after repeal in the beer distributing business under the name of S. Falcone & Bro. Salvatore Falcone was in the broom manufacturing business under the name of Peerless Broom Brush Mills and in the cheese manufacturing business under the name of Falcone Cheese Company. (R. 95.)

Salvatore Falcone had given his brother, Joseph, a power of attorney on his bank account (Exh. 398) and Joseph had given Salvatore a power of attorney upon his bank account. (Exh. 399.)

Salvatore under the power of attorney on March 31, 1937, drew a check on Joseph's account to the order of First Citizens Bank and Trust Company in the sum of $4,679.50. On the face of the check is a notation that it is in payment for one thousand bags of sugar. The bank in turn issued its check to the order of Greenspan Brothers, sugar refiners, in the same amount. (Exhs. 407–408.) On April 7, 1937, Salvatore Falcone, under the power of attorney, drew a check on Joseph's account to the order of Greenspan Brothers in the sum of $4,679.50. On the face of the check in the form provided thereon is the notation that it is in payment for one thousand bags of sugar. (Exh. 410.)

SUMMARY

The proposition of law, decided by the Circuit Court of Appeals, is as follows:

> That the seller of goods, in themselves innocent, does not become a conspirator with—nor what is in substance the same thing, an abettor of—the buyer, because he knows that the buyer means to use the goods to commit a crime.

The question presented to this Court by the Government is:

> Whether one who knows of the existence of a conspiracy to produce distilled spirits in violation of the Internal Revenue laws and knowingly provides essential materials by selling them to the conspirators or to their immediate vendors, may be convicted as a co-conspirator.

The question presented by the Government differs from the rule followed by the Circuit Court.

> (a) In it is omitted the important element, that the goods be "in themselves innocent."
>
> (b) The question assumes the respondents knew of the existence of a conspiracy.

The rule followed by the Circuit Court of Appeals is applicable to this particular case. It cannot be broadened to comprehend facts and circumstances not presented in this case.

Mere knowledge that a customer will sell to someone who means to use sugar for an illegal purpose does not make the seller a conspirator with the unlawful user.

The Court below found no evidence of an intent on the part of these respondents to commit a crime. There is no such evidence in the case.

Sharing in the stake in the enterprise, promoting the venture himself, making the venture his own are all elements evidentiary of intent, and are lacking in this case.

Failure to forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use, does not establish a person as a conspirator with the unlawful user.

The Government's proposal to leave to the restraint of prosecutors and the conscience of juries whether one who comes squarely within its definition of a conspirator under its theory, should be found guilty is unsound and dangerous.

There do exist degrees of culpability, degrees of crime, but there can be no degree of the fact of guilt. One is either guilty or innocent of crime.

There is no evidence and no claim that these respondents ever sold sugar to illict distillers.

In the case of Joseph Falcone, the Circuit Court of Appeals assumed the evidence to be enough to charge him with notice that his customers were supplying the distillers.

In the case of Salvatore Falcone, the Circuit Court of Appeals found, referring to sugar sold by his brother, there is really nothing to show that he knew its eventual destination.

The decision of the Circuit Court of Appeals that the evidence was insufficient to establish the guilt of these respondents is correct and should be affirmed.

ARGUMENT

THE SELLER OF GOODS, IN THEMSELVES INNOCENT, IS NOT A CONSPIRATOR WITH NOR AN ABETTOR OF THE BUYER BECAUSE HE KNOWS THAT THE BUYER MEANS TO USE THE GOODS TO COMMIT A CRIME.

In the opinion of the Circuit Court of Appeals, written by Judge Learned Hand, this question is propounded:

> Whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime? (R. 236.)

The Court then answered the question in the negative.

The Government's appeal must stand or fall on that question. The inquiry may not be broadened. Neither the verbiage nor the meaning of the question is elastic. It may not be stretched to cover abstract cases. Words or phrases of the question may not be omitted; nor may words be substituted

to broaden the scope of the question beyond the limit in the mind of the Court which delivered the opinion.

Analysis of the question reveals two basic elements of the hypothesis:

(1) The goods sold must be in themselves innocent.

(2) Knowledge on the part of the seller of the use to which the buyer means to put the goods.

The question comprehends no other facts. The rule of law enunciated, was applied to the facts of this case, and is limited by the Court to the facts found or assumed.

The question presented by the government in its brief, differs widely in verbiage, in substance and in meaning from the question asked and answered by the Circuit Court of Appeals.

First, it omits an important element of the rule followed by the Circuit Court, that the goods must be in themselves innocent. Second, it assumes knowledge on the part of the seller not only that the *buyer means* to use the goods to commit a crime, but knowledge of the existence of a conspiracy.

Neither the evidence nor the opinion of the Circuit Court of Appeals warrants this all-embracing assumption.

In the opinion, Judge Hand went no further in the case of Joseph Falcone than to "assume that the evidence was enough to charge him with notice that

his customers were supplying the distillers." In the case of Salvatore Falcone, the opinion states: "The evidence against Salvatore Falcone went no further than to show in various ways that he helped his brother in purchase of sugar during the period in question. There is really nothing to show that he knew its eventual destination." (Opinion, R. 234–235.)

In the case of Salvatore Falcone, therefore, the Circuit Court has made a conclusion that as to him there is no evidence to show knowledge that any buyer meant to use sugar for a criminal purpose. As to Joseph the assumption is not that he was selling to distillers, but that he was chargeable with notice that his customers were selling to distillers.

There is nothing in the evidence nor in the assumption of fact by the Circuit Court of Appeals to warrant a finding of intent to further the aims of a conspiracy. Forgetting, for the moment, that the question of the Circuit Court does not assume knowledge of the conspiracy, the fact is Joseph Falcone was selling to wholesale grocers sugar, an everyday, innocent commodity.

Mere knowledge that his customer would sell to someone who would use the sugar for an illegal purpose, could not make him a conspirator in its unlawful use. As the Government concedes in its brief (page 22) "accessorial assistance must be intentional for criminal responsibility to attach." *Hicks* v. *United States*, 150 U. S. 442. The dissenting opinion of Mr. Justice Holmes in *Abrams* v. *United*

States, 250 U. S. 616, quoted in part in the Government's brief, is directly applicable here. At page 626 and 627 Mr. Justice Holmes states:

> I am aware, of course, that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

The opinion of the Circuit Court of Appeals on its face, shows that in the case of the respondents the Court failed to find any evidence of intent. The reasoning, upon which the application of the rule, applied to the facts, is based, demonstrates this. In

other words, to put it succinctly, what the Court decided was that knowledge alone, without intent, without aim to promote the conspiracy is not sufficient to brand one as a participant in the conspiracy.

That this was the mind of the Circuit Court is made clear by Judge Hand's reference to the Court's earlier decision in *United States* v. *Peoni*, 100 F. (2d) 401. Said Judge Hand:

> "In that case we tried to trace down the doctrine as to abetting and conspiracy, as it exists in our criminal law, and concluded that the seller's knowledge was not alone enough." (Opinion, R. 234, at 236–237.)

Much weight of the Government's criticism of the decision of the Circuit Court is placed upon that part of the opinion wherein the Court states "he must in some sense promote their venture himself, make it his own, have a stake in its outcome." (R. 237.) Also in *Backun* v. *United States*, 112 F. (2d) 635, the Circuit Court of Appeals for the Fourth Circuit said "guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case."

The theory of criminal liability for which the Government contends rules out the presence or absence of a stake in the criminal enterprise, but concedes it is of important evidentiary significance. But the Government's theory limits the evidentiary significance to a determination of the presence or absence of knowledge on the part of the seller. (Gov. Brief, page 24.)

It is unimportant to the decision of the question here, that a stake may be evidentiary of knowledge, because the Circuit Court of Appeals assumed in its decision, knowledge. The point obviously made by Judge Hand in his opinion is that in the absence of a stake in the enterprise, in the absence of the seller's promotion of the venture himself, in the absence of anything to show he made the venture his own, there cannot be said to be intent and participation in the venture branding the seller as an actual participant in the conspiracy. The Circuit Court's words were used in application to the facts of this particular case. In other words, in this record, the Circuit Court of Appeals found no promotion of the illegal venture by these respondents themselves. It found they did not make it their own. It found they did not have a stake in its outcome. In other words, they found lacking in the case, facts necessary to evidence the essential element of intent.

Reason as we will, we must return to the proposition that the Circuit Court of Appeals found as to these respondents no evidence of any participation in criminal activity. The Court did assume knowledge on the part of the respondents and held that knowledge alone is not sufficient. This statement of the law the Government concedes to be correct. (Gov. Brief, page 22.)

> "To constitute an accomplice one must be so connected with a crime that at common law he might himself have been con-

> victed either as the principal or as an accessory before the fact. To warrant such a conviction the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not of absolute necessity criminal. Before it will have that effect it must have been done with the *intention* on the part of the actor that it shall aid in the commission of the crime."

People v. *Zucker*, 20 App. Div. (N. Y.) 363 at 365. Affirmed on Opinion below, 154 N. Y 770.

Again may we refer to the opinion of the Circuit Court of Appeals wherein it is stated:

> "It is not enough that he does not forego a normally lawfully activity of the fruits of which he knows that others will make an unlawful use;" (R. 237.)

It is respectfully submitted that a contrary doctrine would be not only unsound but dangerous.

The Government by its phrasing of the question presented to this Court seeks a rule upon a proposition of law, abstract rather than concretely applicable to the facts of this case and the decision of the Circuit Court of Appeals. It seeks a rule which would encompass all, but which would leave to "the restraint of prosecutors and the common conscience of Court and jury," not culpability, but immunity

from conviction or pardon of guilt. (Gov. Brief, page 26.) Such doctrine is unsound. To establish its danger it is not necessary to resort to the "simple and familiar dialectic of suggesting doubtful and extreme cases," which met the disapproval of this Court in *Santa Cruz Co. v. Labor Board*, 303 U. S. 453. The char woman cleaning the office of the conspirators (Gov. Brief, page 25), may be an extreme example. The merchants selling commodities of which thousands may be put to criminal purposes, the automobile dealer, the gasoline dealer and many others of like occupation are real and proximate examples as were the telephone service men in *State* v. *Coleman*, 126 Fla. 203. If knowledge alone, without intent or other participation, satisfies the requirements of the definition of a conspirator, the rule is extended beyond all the bounds of necessity for reasonable regulation of human conduct, the chief aim of all law.

There are of course, in most penal systems, degrees of crime mainly dependent upon the seriousness of the acts or omissions which constitute culpability. The statements of this Court in *Santa Cruz Co.* v. *Labor Board, supra*, are not in point here. True, as this Court pointed out in that case, the question of degree is constantly met in various relations. The Court aptly cited problems arising before the Inter-State Commerce Commission as to whether an intra state carrier causes undue and unreasonable discrimination against inter state or foreign commerce; and under the Employer's Liability Act,

whether the employee's occupation at the time of his injury is in inter-state transportation, or in work so closely related to such transportation as to be practically a part of it; and in the enforcement of the Clayton Act, whether the effect of provisions in contracts for the sale of commodities is to substantially lessen competition.

Other instances of degree might be cited familiar to the every day practitioner, such as the degree of care required of common carriers, or of the ordinary citizen in the operation of his automobile, or of owners of real property in the maintenance of their property, or even of lawyers and physicians in the practice of their professions.

But such measurements of degree extremely differ from a situation where a person comes squarely within the definition of the Government's proposed rule, and is a criminal offender. It would be a reversal of the fundamental theory of our jury system, to leave to the "conscience" of the jury whether it would acquit or convict after having found the facts proving a defendant guilty under the law. Indeed, the "hypothetical people who fix the leaking roof at the still or sell the gambling house one pack of cards," knowing the nature of the enterprise they are assisting, and the "char woman who, in the ordinary course of her duties, cleans the offices which the conspirators use," knowing of the criminal plan, (Gov. Brief, page 25) would be subject to conviction if the rule advocated by the Government were law.

Throughout the brief of the Government it is taken for granted that the Circuit Court of Appeals found or assumed that these respondents knew of the existence of a conspiracy.

It is respectfully submitted that no such fact was found or assumption made. On page 20 of the Government's brief, referring to *Young* v. *United States*, 48 F. (2d) 26, it is stated: "If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy; and there was no evidence that he actually conspired with anyone himself."

On this appeal we find these respondents far more remote from the operation of stills than were the defendants in the *Young* case. These respondents, Joseph and Salvatore Falcone, did not sell to distillers and are not charged with selling to distillers. Yet in that case the Court said:

> "The conviction of the sellers cannot be sustained on the ground that they had knowledge of the intention of the purchasers to use the sugar and other articles in connection with the unlawful manufacture of liquor. One cannot be held as a member of a conspiracy upon proof merely that he had knowledge of, or negatively acquiesced, in a crime that was about to be committed. But in order to fasten guilt upon one of being a conspirator, it is necessary to prove that he actively participated in the conspiracy charged. Bishop's Criminal Law (9 Ed.)

Sec. 633; 5 R. C. L. 1065; McDaniel v. United States (C. C. A.) 24 F. (2d) 303."

Young v. *United States*, 48 F. (2d) 26 at 27.

In *DiBonaventura* v. *United States*, 15 F. (2) 494, the Trial Court gave to the jury a rule of law similar to that for which the Government here contends. The Trial Court said: "If these things alleged, still, mash barrels, and so forth, went into his property with his knowledge and consent, he is an accessory to the crime of conspiracy, that is what I mean to say." And again the Trial Court said "if he knew this was going on in his property and he doesn't stop it, he becomes an accessory to the crime of conspiracy." But on appeal the Circuit Court, Fourth Circuit, held the charge went too far, and reversed the conviction. In its opinion the Court said:

> "But a landlord is not necessarily guilty of conspiracy to violate the Prohibition Act, merely because he has knowledge that liquor is being manufactured on his premises and does not stop it. As has been often said, the gist of the crime of conspiracy is the unlawful agreement. 'Conspiracy exists whenever there is a combination, agreement, or understanding, tacit or otherwise, between two or more persons for the purpose of committing an unlawful act.' Fisher v. U. S. (C. C. A. 4th) 13 F. (2d) 756; Pettibone v. U. S. 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419; Commonwealth v. Hunt, 4

Metc. (Mass.) 111, 38 Am. Dec. 346. The conspiracy to commit the crime is an entirely different offense from the crime which is the object of the conspiracy. U. S. v. Rabinowich, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211; Fisher v. U. S. supra."

CONCLUSION

It is, therefore, respectfully submitted that the question presented to this Court by the Government differs materially from the rule followed by the Circuit Court of Appeals; that the Court below correctly applied the law to the case of these respondents, and that its decisions should be affirmed.

DANIEL H. PRIOR,
Attorney for respondents,
Joseph Falcone and Salvatore Falcone.

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IN THE

Supreme Court of the United States

October Term, 1940

No. 42

THE UNITED STATES OF AMERICA,
Petitioner,

—*v.*—

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE and JOHN NOLE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT, HENRY ALBERICO.

ROGER O. BALDWIN,
Attorney for Respondent,

DONALD P. GORMAN, Esq.,
Of Counsel,
Syracuse, New York.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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BRIEF FOR RESPONDENT, HENRY ALBERICO.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 234-239) is reported in 109 F. (2d) 579.

Question Presented.

Whether the seller of goods, in themselves innocent, becomes a conspirator with——or, what is in substance the same thing, an abettor of——the buyer, because he knows that the buyer means to use the goods to commit a crime.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, as a principal.

Statement.

On appeal by the respondents, Henry Alberico, Joseph Falcone and Salvatore Falcone, and three other defendants, the Circuit Court of Appeals for the Second Circuit, reversed the conviction of the respondents and affirmed the convictions of the others, (R. S. 241-242), but with respect to respondents, the evidence was held to be insufficient to

the objective rule of liability, which the Circuit Court of Appeals laid down. The evidence on the trial against the respondent, Henry Alberico, was as follows:

The firm of Alberico and Funicello was a partnership having been in business for the past twenty years in the City of Utica and employed four travelling salesman who traveled over a radius of approximately two hundred miles from the City of Utica; that the firm sold to approximately 1500 retail customers outside the City of Utica, N. Y. The firm dealt in about 525 different articles among them sugar, and 5 gallon tin cans. (R. 98).

Between January, 1937 and Sept. 1938, 9743 bags of sugar of 100 lbs. each were purchased by respondents' firm which sugar had been purchased in the open market from four different jobbers and wholesalers (R. 140).

Between June, 1936 and March, 1938 there was purchased by the respondents' firm 30,500 five gallon tin cans from the Atlas Can Co. These cans were sold to other concerns throughout several states, and all transactions had with respondent were in the usual course of business, on credit and it was the usual procedure for wholesale grocers to buy 5 gallon tin cans, (R. 73-74).

Although evidence was given in regards to twenty-two stills at only one and on one occasion was a carton found upon which was stencilled "Alberico & Funicello" from Atlas Can Co. Brooklyn, N. Y. (R. 39).

On eight occasions one Salvatore Morreale who was indicted as a co-conspirator but not tried nor convicted[1]

[1] The statement in the Government's brief that Morreale was one of the convicted defendants is erroneous.

went with one of his (Morreale) employees named Blake to the warehouse of Alberico & Funicello. Blake stated on one occasion during March, 1938 he heard the following conversation between Alberico and Morreale. Salvatore Morreale said to Alberico, "You could have trusted me for sugar this morning." Alberico replied, "I can't trust you because your business is too risky." (R. 52-53).

That Salvatore Morreale and his family have operated a grocery store in the City of Utica, for several years and that they have been a customer of the firm of Alberico & Funicello (R. 101) during the entire period.

During the early part of 1937 circulars were being sent by sugar jobbers to the trade urging them to buy sugar as a bill was in Congress to tax sugar $1.00 a bag (R. 144).

At the time of the trial respondent's firm was purchasing about 7500 lbs. of sugar per week from one jobber alone and no claim was made that this sugar was being diverted (R. 76).

The amount of sugar sold by Alberico and Funicello was not an unusual amount for the volume of business done by this firm (R. 76).

Summary of Argument.

The question presented by the government as the question to be decided herein is not the question decided by the Circuit Court, and contains unwarranted assumptions and conclusions.

With reference to defendant Alberico, the Court stated:

> "A jury might also have taken the conversation which he had with one of the distillers, Morreale, as

evidence of his knowledge of the kind of business that he was supplying."

The Court a little later continued:

"In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or what is in substance the same thing, an abettor of—the buyer, because he knows that the buyer means to use the goods to commit a crime."

We submit that the above language of the Circuit Court of Appeals is incapable of construction as formulated in the government's posed question.

The distinction between sections 37 and 332 of the Criminal Code as applicable to the instant case we deem of little import, except to call the Court's attention to the fact that this defendant was indicted for conspiracy to violate certain provisions of the Internal Revenue Act and not under the aider and abettor section. The Circuit Court of Appeals has treated the two as synonymous herein and we follow the reasoning of the court.

We concede the government's definition of conspiracy. We deny that this rule is based upon the principal embodied in section 332 of the Criminal Code, but suggest that such conflict is immaterial here.

It is conceded that intent is a necessary ingredient of the charge against this defendant, but the government's conclusion that the familiar rule of criminal liability relative to natural consequences following the act as applicable herein, is challenged as is the argument that the presence

or absence of a "stake" in the success of the enterprise assisted is relevant only as to knowledge.

It is respectfully submitted that knowledge of the specific crime as well as the purpose to use these particular sales as a means to effect the objects of the crime are conditions precedent to any claim of illegality and that the "stake" characterized by the Circuit Court of Appeals presupposes an interest in the success of the crime predicated upon such knowledge and intent.

This court is not concerned with the facts herein other than whether there is any evidence to take the case to the jury, under the assumptions of the Circuit Court.

It is respectfully submitted that the government has entirely failed to sustain its burden that defendant was directly connected with the enterprise herein. That he ever confederated or was acting in concert with the actual participants. That he was an indispensable cog in the operation of same or deliberately cooperated knowingly as a member of the said conspiracy. On the contrary, the Circuit Court found, and we reiterate said finding, that the sales herein of innocent commodities were incidental and not indispensable and were made with mere knowledge that the buyers of same were engaged generally in a criminal enterprise and that any profit obtained by defendant by reason of said sales was not such a stake or interest in the existing conspiracy as would warrant the speculation of a jury as to his knowledge, motive and intent.

It is respectfully submitted that the line of demarcation in cases such as this between acts which are only incidental and those based upon deliberate cooperation for the specific purpose of furthering the aims and objects of the enter-

prise are in each instance a question to be determined in the particular case by the various courts and not left to the unsupervised discretion of divers government officials and prosecutors.

Argument.

It is fundamental that the neglect of a legal duty or the commission of an act innocent in and of itself does not constitute a crime unless some statute so prescribes. Purely statutory offenses cannot be established by implication and acts otherwise innocent and lawful, do not become crimes unless there is clear and positive expression of the Legislature's intent to make them criminal.

No claim is made herein that defendant was an original conspirator. The gist of the government's argument seems to be predicated upon the claim that he became an aider and abettor or at common law, an accomplice or accessory after the fact.

A person is not deemed an accomplice merely because he had knowledge of the intended commission of a crime.

Bird vs. United States, 187 U. S. 118.

It is also true, that one does not become an accessory before the fact by the mere approval of a crime. "Enough must be shown to justify the inference that the offender has counseled or induced or encouraged the crime."

People vs. Swersky, 216 N. Y. 471.

An approval of a crime voiced to the wrong-doer before its commission would not suffice always to charge one as a principal. Long ago it was said in Hale's Pleas of the

Crown, 616: "And therefore words that sound in bare permission make not an accessory."

Mr. Bishop in his work on Criminal Law, Paragraph 695, sets forth the rule that the true test for determining whether one is an accessory after the fact is to consider whether what he did was done by way of personal help to his principal, with a view of enabling the principal to elude punishment. So to furnish one with a horse to escape or to conceal or rescue the principal, renders one an accessory but not so the failing to make known the felony, forebearance to arrest, or charitably supplying the prisoner with food, or agreeing not to prosecute, etc. To the same effect is Wharton on Criminal Law, Par. 241.

Nor would the fact that one received a portion of the stolen property knowing it to be stolen be sufficient at common law.

1 Bish. Cr. Law, Par. 692, 695, 699.

What is the test to be applied to determine whether a person is an accomplice? The courts have repeatedly held that he must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact. We do not understand from the government's argument that this defendant is claimed to have been an original conspirator and if such claim is made on argument, it must necessarily be based upon inference and not upon direct proof. Further, in this case it would be an inference based upon an inference and of no legal effect. Where the principal circumstances urged from which to infer guilt is wholly based upon an underlying circumstance or inference the same is insufficient.

Every inference must stand upon some clear, direct evidence.

Vernon vs. U. S., 146 Fed. 121, 125.

It is in the intent to do the substantive crime that moral turpitude inheres.

U. S. ex rel. Meyers vs. Day, 54 Fed. 2nd, 336.

The assumption by the Circuit Court of Appeals that a jury might have inferred from one remark had with one of the distillers, Morreale, that the defendant "had knowledge of the kind of business that he was supplying" certainly would not permit them to infer that he had knowledge or was connected with the specific conspiracy itself.

Conspiracy may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of persons charged to act together for the accomplishment of the unlawful purpose.

Where is the common purpose or design herein? Did Alberico do everything a conspirator or aider or abettor in his position would do to facilitate the conspiracy? The very evidence relied upon in the assumption of the Circuit Court to connect him entirely negatives this. He refused to sell on credit.

It has long been settled law that the basis and gist of a civil action for conspiracy are the damages occasioned by the wrongful act of one or more persons, and that the only materiality of the allegations with respect to the conspiracy or combination with those who were not the direct actors is to connect them with or make them responsible for the acts of others.

Cooley on Torts (2nd Ed. P. 143-144).

In determining a question of fact from circumstantial evidence there are two general rules to be observed. First, the hypothestis of delinquency or guilt, should flow naturally from the facts proved and be consistent with them all. Second, the evidence must be such as to exclude to a moral certainty every hypothesis but that of guilt.

Union Pacific Coal vs. U. S., 173 Fed. 737.

U. S. vs. Buchaltar, 88 Fed. 2nd 625.

Vernon vs. U. S., supra.

At common law in misdemeanors there were no accessories, all concerned, whether instigators or perpetrators were principals, except in liquor cases, certain summary offenses, and including negligences. There is authority that the exceptions were predicated upon the absence of joint intent.

Reg. vs. Kendrick, 5 Q. B. (Eng.) 49.

Heyman vs. Reg., L. R. 8 Q. B. 102. (8 Eng. Rul. Cas. 126).

People vs. Powell, 63 N. Y. 88.

At common law, to constitute an accomplice, one must be so connected with a crime that he himself might have been convicted either as the principal or as an accessory before the fact. To warrant such a conviction, the one accused must have taken part in the perpetration of, or preparation for the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not of absolute necessity criminal. Before it will have that effect it must have been done with the intention on the part of the actor that it shall aid in the commission of the crime. Unless it appears without dispute that

there was such intention, the person doing the act cannot be said to be a principal; and if there is a question whether the act was done with such intent, that question must be submitted to the jury and answered by them in the affirmative, before the actor can be held to be a principal, and consequently before he can be held to be an accomplice.

People vs. Zucker, 20 A. D. 633, affd. on opinion below 154 N. Y. 770.

Of course the jury may not be allowed to speculate, guess or surmise as to the question thus posed, but must make a finding based upon direct evidence or a proper inference from circumstantial evidence, which excludes every reasonable hypothesis but that of guilt and which is of sufficient probative force to warrant its submission. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.

Intent is the purpose to use a particular means to effect a definite result.

Motive is the moving power which impels to action for such result. It is an inducement, or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives in any speculative sense neither the law nor the tribunal which administers it has any concern. (Bur. on Circ. Evidence

296.) It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case.

Mere cooperation without an understanding may not make a conspiracy.

Wiley vs. State, 19 Ariz. 346.

"Abet" is synonymous with "aid" and "assist."

State vs. Flynn, 72 Atl. 296.

It includes knowledge of wrongful purpose in the act of perpetration and implies counseling, encouragement or assistance.

People vs. Lewis, 9 Cal. App. 279 (98 Pac. 1078).

People vs. Bond, 13 Cal. App. 175 (109 Pac. 150).

There can be no criminal responsibility for anything not fairly within the common enterprise. In other words, the principal is quite analogous to that of agency, where the liability is measured by the express or implied authority.

People vs. Knapp, 26 Mich. 112.

The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental cooperators.

The interposition of concurrent wills in pursuance of a common plan makes each confederate liable in the specific enterprise.

It is otherwise, however, if the casual connection between the act and the crime is broken by the interposition of independent responsible human action. Following this to its logical conclusion—a defendant, no matter how wrongful may have been his conduct, is not responsible for the acts of independent parties performed on the objects of the crime without his concert.

Rex vs. Hilton, 2 Lewin C. C. (Eng.) 214.

As has been often said, the gist of the crime of conspiracy is the unlawful agreement. "Conspiracy" exists whenever there is a combination, agreement or understanding tacit or otherwise between two or more persons for purpose of committing unlawful acts.

Fisher vs. U. S., 13 Fed. 2nd 756.

Pettibone vs. U. S., 148 U. S. 197.

The confederation must in and of itself be corrupt. This is implied in the meaning of the term "conspiracy."

People vs. Powell, 63 N. Y. 92.

State, Wood, Prosecutor vs. State, 47 N. Y. L. 461.

And of course it is fundamental that mere passive cognizance of a conspiracy is not sufficient to make a co-conspirator or an aider or abettor.

Reg vs. Barry, 4 Frost and F. (Eng.) 389.

Evans vs. People, 90 Ill. 384.

Procuring implements or other means to be used in the commission of a specific offense with intent that they shall be so uesd, and knowingly assisting the perpetrators of the

offense in preparation therefor, makes one a principle in the consummated offense out supplying implements to one who makes a bad use of them does not render the person supplying them responsible where he acts innocently.

All of the factors mentioned above, namely a specific offense, intent, indispensibility and knowledge of the specific offense are necessary factors.

State vs. Scott, 80 Conn. 317 (68 Atl. 258).

A watchman appointed to guard a bank sees burglars approach and allows them to steal without interruption. By so doing he becomes assistant in the felony. But unless his abstention from interference removes a check which would otherwise prevent the commission of the crime, and is therefore equivalent to a positive act of assistance, the person so abstaining does not become a party to the crime.

Hawkins, J., in *Reg. vs. Coney*, L. R. 8, Q. B. Div. (Eng.) 534, 15 Cox C. C. 46.

The sales of commodities innocent in themselves do not import any agreement or concert of action. Although defendant sold sugar to anyone who had the price and in many instances upon credit, he is only charged herein with sales to Morreale who was a grocer and illegal distiller. As far as the assumption of the Circuit Court goes, the defendant only knew about Morreale and in which category he was so classified as a customer the record is barren. The Circuit Court assumed defendant's knowledge that he was supplying innocent commodities to an illegal distiller. The Court did not imply knowledge of the specific conspiracy itself, and if that is so, there was no existing conspiracy to which the defendant became a party and under sections

332 liability would only attach for the substantive offense if it were committed by defendant.

The ultimate issue as set forth by the government in its brief is not "whether the sales of materials with knowledge that they will be used by the buyer to commit a crime brings the defendant within the scope of Section 332," but rather whether such sale with knowledge that they may be used by the buyer to commit a specific crime make him guilty of violating Section 37. As stated by the Circuit Court in U. S. vs. Peoni, 100 Fed. 2nd, 401, 402, the "various definitions do not turn on the question of probability but rather on the necessity that defendant in some way associated himself and have an interest in the venture, that he participated in it as something he wishes to bring about, that he seek by its action to make it succeed. All the words used—even the most colorless, 'abet,'—carry an implication of purposive attitude toward it."

It is to be noted that the case here presented is that of a mere seller of merchandise who has knowledge that the buyer intends to put it to an unlawful use but who cannot be said in anywise to will the unlawful use to the buyer.

Further, it is the contention of the defendant herein that the assistance itself may not be casual or incidental but must be in effect indispensable and we submit that in all of the cases cited by the government herein as authority for their position these necessary factors are present. Also, in such citations and without exception as far as we can find, the commodities furnished are not inherently innocent but in and of themselves are either dangerous instrumentalities, contraband, or permeated with the taint of violence, illegality or as in the case of real estate providing affirmative shelfer and assistance.

Furthermore, intention is present in each. All of such cases can be distinguished. As in Vukich vs. U. S., 28 Fed. 2nd, 666, the materials were knowingly and intentionally delivered to the distillery and not sold as here at the defendant's regular place of business in the open market. It is not the intention of the defendant to lengthen this brief by attempting to point out to the Court the various distinctions in each and every one of the long list of cases cited by the government. Suffice it to say that in each of these cases there are obvious factors present or missing which differentiate it from the instant case.[2] In looking at one more of the government's cases set forth at length upon the brief herein, namely Backun vs. U. S., 112 Fed. 2nd, 635, in accordance with the above we find that defendant sold an automobile to one Zucker knowing it to have been stolen, and knowing it was to be used in interstate transportation. Again we have a specific crime with the defendant providing an indispensable and essential cog in the criminal design and enterprise.

Certain dicta in the opinion in the Backun case may be construed as prohibiting the sale of any article no matter how innocent or incidental. This conclusion is, we submit, wrong, and where is the line of demarcation to be drawn?

It seems obvious that selling a gun to a known murderer to commit a specific murder would be entirely different than the position of the optician who sells him glasses even though through reputation the optician may know that he may utilize such glasses in order to shoot more accurately. We answer our own query by the suggestion which we be-

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[2] Backun vs. U. S. 112 Fed. 2nd, 635 (sale of stolen goods). Borgia vs. U. S. 78 Fed. 2nd, 550 (Sale—plus delivery to still) Cardival vs. U. S. 50 Fed. 2nd, 166 (lease of property plus hauling of materials) Hubinger Co. vs. U. S. 64 Fed. 2nd, 772 (Company organized for specific purpose of conspiracy and delivery to drops).

lieve to be the law from time immemorial. That in cases of this type each one must stand upon its own feet and the court and appellate courts have and will determine this type of case upon the facts in each particular case.

Upon the argument herein in the instant case, a legitimate coal dealer who provided coal for the still fires or the merchant who sold a box of matches to light said fire or tires for the truck that was to carry the product away would be equally guilty. A wholesale liquor dealer who sold liquor to retailers knowing they were violating laws as to hours of distribution, etc., would be guilty of conspiracy or the farmer who knowingly sold his fruits for the making of illegal wines or his grain for the illegal manufacture of whiskies. If the law was as the government contends, no business man would dare sell any product which might be used illegally by a criminal purchaser unless he first made an exhaustive examination and research as to the purpose for which the buyer intended to use the product.

If a man should go into a reputable hardware store and ask to purchase a pump which would throw a certain stream of water and inform the merchant that he desired to use said pump in the operation of an illegal still, would the merchant under the law, of necessity be compelled to decline the sale by reason of self-implication? Take the plumbers' supply company, who in the ordinary course of business furnishes pipes and couplings to the operator of a still. Would this company be guilty of conspiracy to operate an illegal still and for the failure to pay a tax upon the illegal alcohol to be manufactured? Would it be his duty to procure a bond or do any other act necessary for the legal operation of a distillery? We submit that such

is not the law, nor should such burden be placed upon the ordinary seller of legal goods in an open market and that such far-fetched conclusions seem dangerous and in fact ridiculous.

If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy.

Young vs. U. S., 48 Fed. 2nd, 26 (C. C. A. 5th).

DiBonaventura vs. U. S., 15 Fed. 2nd, 494, 496.

Wtih reference to the latter case the suggestion that the Circuit Court ignored the question of specific knowledge of the existence of a conspiracy is incompatible with their decision and with defendant's interpretation of the court's assumption. The court below logically follows its reasoning in the above case and particularly in the Peoni case and this court will not assume that the Second Circuit based its logic and reasoning upon assumptions which are not apparent and may only be argued by strained construction of the court's language. The reasonable interpretation and the reasonable effect of the language employed is consistent with the past logic of the court in the other cases cited and with the verbiage of the decision in the instant case.

The government concedes that accessorial assistance must be intentional,

Hicks vs. U. S., 150 U. S. 442,

but argues that for most of the purposes of criminal responsibility a consequence is intended when the actor knows that the consequence is likely to follow from the act. With this we generally agree, but fail to see the connection in the case at bar.

Is the government attempting to establish criminal agency or estoppel? If so, it again fails according to settled law. It was a matter of indifference to respondent Alberico what Morreale did with the sugar and tin cans, after the sale was completed. The government made or makes no claim to the contrary and such claim would be ineffectual upon the record herein. There is no proof that if the sale were declined the sugar and materials could not have been obtained elsewhere.

There is nothing in the evidence relied upon herein to show guilty knowledge which presupposes some antecedent understanding. There is not even association other than as vendor and vendee in the ordinary course of established business. The inference must be justified that these sales were a step in the consummation of a comprehensive plan and in reality a continuing agency, to justify this portion of the government's argument, and the Circuit Court did not and could not under the proof in this case assume any such facts. In viewing the totality of the acts we must be able to perceive the nexus of the common scheme. That there was more than one sale is immaterial. We find no principal of criminal law which recognizes the relation of principal and agent in the exact sense in which the term is used in reference to business or commercial transactions. In Civil actions upon contract the course of dealing between parties may be proved to establish a general agency but that principle has no place in criminal jurisprudence. From such evidence in civil actions a presumption is raised that the relation shown to exist in other transactions continues or an estoppel is created which prevents the principal from denying the agency, and hence is presumptive or conclusive evidence of the fact. No such presumption or conclusion

arises in a criminal case. There the presumption is of innocence and the doctrine of estoppel has no application. Criminal agency is merely another word for criminal conspiracy. The agency that will subject the employer or agent to criminal liability must be an actual agency and not merely apparent.

It is axiomatic that so long as the burden is upon the government of not only removing the presumption of innocense but of establishing the guilt of the accused beyond a reasonable doubt, a mere scintilla or even some proof is not sufficient to warrant the submission of the case to the jury.

People v. Owens, 148 N. Y. 648.

Insufficient evidence is still in the eyes of the law, no evidence.

Matter of Case, 214 N. Y. 199, 203.

We earnestly contend that in this case it must be held as a matter of law, that the proof was of such a character and fell so far below the standard prescribed by law, that the case against this defendant should have been withdrawn from the jury.

The words by which defendant's knowledge was assumed herein negative and disapprove criminal theory. If the appellant herein was in fact a conspirator would he have said, "I can't trust you because your business is too risky?" Would he not more likely have said, "Why certainly you can have the sugar. That is my part in this enterprise. When you sell the alcohol, pay me for the sugar and I will divide up the profits," or that in substance.

The latter statement would have been the act of a conspirator and we submit the actual statement conclusively establishes that defendant had no interest or stake in the criminal enterprise. It seems apparent that he was interested solely in the sale of his merchandise and there is no evidence in the case, omitting the assumption of the Circuit Court, that defendant herein knew that Morreale was not taking this merchandise to his grocery store rather than to his still.

The government concedes that no accessorial liability exists in the absence of actual knowledge of the existence of a criminal plan which will be furthered by the acts of assistance. It contends, however, that when such knowledge exists, assistance is intentional and criminal liability ensues and cites for sustaining authority, certain excerpts taken from the writings of Mr. Justice Holmes. The dicta cited is from entirely dissimilar cases and upon unrelated theories and seems to us to emphasize the desparation of the government's argument. We earnestly believe that the immortal champion of human rights and justice would be the first to repudiate such a construction and application of his language to the instant case, were he present here once more.

It has been suggested by the government that the rule of law laid down by the Circuit Court of Appeals places a restriction which nullifies the only effective weapon for speedy conviction of a wide spread criminal combination in one trial and that unwarranted immunity is confered upon persons who knowingly facilitate the commission of crimes.

However desirable such a weapon may be, it should be provided by legislative action rather than by judicial expansion of the conspiracy statute.[3]

Their conclusion presumes intent and criminal responsibility, where any assistance, no matter how trivial, is knowingly given. But what do they mean by assistance? Clearly, at common law and today an abstention from interference unless based upon affirmative duty, would not be enough. To urge that one who performs an incidental act would necessarily come within this category, would be to jeopardize our entire business and social structure. We respectfully suggest that assistance in its legal criminal effect is more confined than this broad conclusion and requires deliberate cooperation or concerted action in the specified offense in some indispensable way.

As recently stated in the unanimous opinion of the New York Court of Appeals in People vs. Hines, decided October 8, 1940, in discussing appellant's contention that the proof failed to establish that he assisted in contriving, proposing or drawing a lottery, the Court said:

> "In urging his contention defendant fails to distinguish between a case where the only connection of a person with a lottery begins and ends with his performance of incidental acts specified in the particular sections above, and a case where such person performs acts in deliberate cooperation with those conducting and managing the lottery enterprise itself. (Cf. Commonwealth vs. Harris, 95 Mass. 534; State v. Wong Took, 147 Wash. 190). From the activities of defendant set forth above, it is impossible

[3] Harvard Law Review, Vol. 53, page 1392.

to see how he could have been more directly connected with the enterprise. Even assuming that appellant did not physically "contrive propose or draw a lottery" nevertheless those with whom he had confederated and with whom he was acting in concert, to wit, Schultz and his henchmen, were plainly engaged in the physical administration and operation of a lottery. Since some of the members of the combination were engaged in the physical task of drawing and selecting the winning numbers, it follows that the conspiracy necessarily involved the commission of the crimes denounced by section 1372 of the Penal Law. The sole remaining question, therefore, relates to the participation of appellant therein, which would seem to be completely answered by the concession of defendant that the evidence established membership in the conspiracy to commit the crimes charged in the indictment. Defendant was charged and found guilty of the acts of affording protection from arrest and, if arrested, immunity from conviction. Hence, he was an indispensible cog in the inside running of this enterprise, or he was nothing. As the Appellate Division noted, the proof was to the effect that the policy game "could not have been carried on without such protection." To urge that one who provided such protection performs just another incidental act similar to the letting of premises for lottery purposes or the collecting of policy slips and carrying them from one destination to another, is to lose sight of the distinction noted above between the connection with the lottery which begins and ends with the incidental

act, and where such act is in deliberate cooperation with those conducting and managing the lottery enterprise itself. In other words, while a person who sells to another $10,000.00 worth daily of tickets may be guilty of a misdemeanor under section 1373, in selling lottery tickets, he may also be charged with violating section 1372 if the jury finds that he has acted in concert and cooperation with the persons who contrived, proposed or drew the lottery. So in the case at bar appellant could unquestionably have been prosecuted for conspiracy to obstruct justice. But his guilt of that crime would afford him no defense when prosecuted for violating section 1372 in view of the fact that he was a member of the conspiracy to commit the crimes charged in the indictment and was deliberately acting in concert with those operating and conducting the lottery. Where the line would be drawn between acts which were only incidental and those which were deliberate cooperation with those conducting and managing the lottery enterprise and for the specific purpose of furthering the aims and objects of that enterprise, would be in each instance a question to be determined in the particular case."

Of course a person may withdraw from a conspiracy after an incidental act of assistance. Of course they are not conspirators—"the people who fix the leaking roof of the still or sell the gambling house one pack of cards even should those persons know the nature of the enterprise they are assisting." The government further concedes the innocence of "The charwoman who in the ordinary course of her duties, cleans the offices which the conspirators use

even if she knows of the criminal plan" although her work is of some assistance. These people have no interest in the fruits of the enterprise itself. These people are not criminals.

In answer to the obvious query of where criminality ends and innocence begins, under the presumption, the government ingenuously suggests that the line of demarcation be left to the restraint of the prosecutors and the common conscience of the court and jury and not by a definite rule of law. If by this statement they accept the logic and result of the Circuit Courts' decision herein as based upon the individual case, they are agreeing with our contention herein and with the reasoning of the New York Court of Appeals, but in the same breath they ask this court to lay down a sweeping and inclusive rule applicable to all these kind of cases based upon the contention that the Circuit Court has negatively done the same thing. We do not so interpret the decision of the lower court and we respectfully ask this court to consider the reasoning of the New York Court of Appeals in the Hines case, supra, which we consider analageous to the Circuit Court's reasoning in the Young case, and the Peoni case and in the instant case. It is true there may be apparent ambiguity in some of the language in the opinion, taken with the treatment of the cases, but it is respectfully submitted that the Circuit Court as was its right and duty, was serving notice upon prosecutors generally, that the present day tendency to sweep within the dragnet of conspiracy everyone who had been associated in any degree with the main offenders no matter how innocent constituted an improper conception of duty.

The "stake" mentioned by the court adds nothing to the interest and intent which have always been necessary in this type of case, and serves as no standard of immunity in future cases where the necessary criminal factors are present. The practical effect of the decision is to advise the government that where an established businessman sells innocent commodities in the regular course of business in the open market for the regular sale price as in the instant case, those facts in and of themsleves do not make him a co-conspirator or aider or abettor of the criminal vendee and that prosecutors should be more judicial in their analysis of the proof in that type of case than they sometime have been in the past.

CONCLUSION.

The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

ROGER O. BALDWIN,
Attorney for Respondent.

DONALD P. GORMAN, ESQ.
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1940.

The United States of America, Petitioner, *vs.* Salvatore Falcone, Joseph Falcone, Henry Alberico, Nicholas Nole and John Nole.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 9, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question presented by this record is whether one who sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws.

Respondents were indicted with sixty-three others in the northern district of New York for conspiring to violate the revenue laws by the operation of twenty-two illicit stills in the vicinity of Utica, New York. The case was submitted to the jury as to twenty-four defendants, of whom the five respondents and sixteen operators of stills were convicted. The Court of Appeals for the Second Circuit reversed the conviction of the five respondents on the ground that as there was no evidence that respondents were themselves conspirators, the sale by them of materials, knowing that they would be used by others in illicit distilling, was not sufficient to establish that respondents were guilty of the conspiracy charged. 109 F. (2d) 579. We granted certiorari, 310 U. S. 620, to resolve an asserted conflict of the decision below with those of courts of appeals in other circuits. *Simpson* v. *United States*, 11 F. (2d) 591; *Pattis* v. *United States*, 17 F. (2d) 562; *Borgia* v. *United States*, 78 F. (2d) 550; *Marino* v. *United States*, 91 F. (2d) 691; see *Backun* v. *United States*, 112 F. (2d) 635. Compare *Young* v. *United States*, 48 F. (2d) 26.

All of respondents were jobbers or distributors who, during the period in question, sold sugar, yeast or cans, some of which found their way into the possession and use of some of the distiller defend-

ants. The indictment while charging generally that all the defendants were parties to the conspiracy did not allege specifically that any of respondents had knowledge of the conspiracy but it did allege that respondents Alberico and Nole brothers sold the materials mentioned knowing that they were to be used in illicit distilling. The court of appeals, reviewing the evidence thought, in the case of some of the respondents, that the jury might take it that they were knowingly supplying the distillers. As to Nicholas Nole, whose case it considered most doubtful, it thought that his equivocal conduct "was as likely to have come from a belief that it was a crime to sell the yeast and cans to distillers as from being in fact any further involved in their business". But it assumed for purposes of decision that all furnished supplies which they knew ultimately reached and were used by some of the distillers. Upon this assumption it said, "In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime. And it concluded that merely because respondent did not forego a "normally lawful activity of the fruits of which he knew that others were making unlawful use" he is not guilty of a conspiracy.

The Government does not argue here the point which seems to be implicit in the question raised by its petition for certiorari, that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here. Cf. *Gebardi* v. *United States*, 287 U. S. 112, 121; *Di Bonaventura* v. *United States*, 15 F. (2d) 494. But the Government does contend that one who with knowledge of a conspiracy to distill illicit spirits sells materials to a conspirator knowing that they will be used in the distilling, is himself guilty of the conspiracy. It is said that he is, either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy, or what is the same thing he is a principal in the conspiracy as an aider or abettor by virtue of § 332 of the Criminal Code, 18 U. S. C. § 550, which provides: "Whoever directly commits any act con-

stituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some.[1] In the case of Alberico, as in the case of Nicholas Nole, the jury could have found that he knew that one of their customers who is an unconvicted defendant was using the purchased

[1] The two Falcones who were in business as sugar jobbers were shown to have sold sugar to three wholesale grocers who in turn were shown to have sold some of the sugar to distillers. To establish guilty knowledge the Government relies upon evidence showing that the volume of their sales was materially larger during the periods of activity of the illicit stills; that Joseph Falcone was shown on two occasions, at one of which Salvatore Falcone was present, to have been in conversation with one of the conspirators who was a distiller, and on one occasion with another distiller conspirator who was his brother-in-law; that Joseph Falcone had been seen at the Venezia Restaurant which was patronized by some of the conspirators and knew its proprietor; and on two occasions Salvatore Falcone had visited the restaurant, on one to collect funds for the Red Cross and on another for a monument to Marconi.

Respondent Alberico was a member of a firm of wholesale grocers who dealt in sugar and five-gallon tin cans among other things. They sold sugar to wholesale grocers and jobbers. To establish Alberico's guilty knowledge the Government relies on evidence that his total purchases of sugar materially increased during the period when the illicit stills were shown to be in operation; that some of his sugar purchases from a local wholesaler were at higher prices than he was then paying others; that on the premises of one of the distillers there were found fifty-five cardboard cartons, each suitable for containing one dozen five-gallon cans, on one of which was stencilled the name of Alberico's firm; that on eight to ten occasions Alberico sold sugar and cans in unnamed amounts to Morreale, one of the defendant distillers who was not convicted, and on one occasion was overheard to say, in refusing credit to Morreale, "I could not trust you because your business is too risky."

Respondent Nicholas Nole was shown to be proprietor of Acme Yeast Company and also the Utica Freight Forwarding Company, to which one and one-half tons of K & M yeast was consigned by the seller. Wrappers bearing the distinctive marks of the Acme Yeast Company and K & M yeast, quantity not stated were found at one of the stills; and a K & M yeast container was found at another. To show guilty knowledge of Nicholas Nole the Government relies on the circumstance that he registered the Acme Yeast Company in the county clerk's office in the name of a cousin; that the order for the consignment of K & M yeast was placed in the name of an unidentified person; that Nole had been seen in conversation with some of the convicted distillers at a time when

material in illicit distilling. But it could not be inferred from that or from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.

The gist of the offense of conspiracy as defined by § 37 of the Criminal Code, 18 U. S. C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone* v. *United States,* 148 U. S. 197; *Marino* v. *United States, supra; Troutman* v. *United States,* 100 F. (2d) 628; *Beland* v. *United States,* 100 F. (2d) 289; cf. *Gebardi* v. *United States, supra.* Those having no knowledge of the conspiracy are not conspirators, *United States* v. *Hirsch,* 100 U. S. 33, 34; *Weniger* v. *United States,* 47 F. (2d) 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. On this record we have no occasion to decide any other question.

Affirmed.

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some of the illicit stills were in operation, and that on one occasion during that period he sold and delivered fifteen five-gallon cans of illicit alcohol from a source not stated.

Respondent John Nole was shown to be a distributor for the National Grain Yeast Company in Utica during the period in question. Yeast wrappers bearing the National labels were found at three of the stills. To show guilty knowledge of John Nole the Government relies on evidence that he had assisted his brother Nicholas in unloading yeast at the Utica Freight Forwarding Co.; that he was a patron of the Venezia Restaurant; that on one occasion he was seen talking with Morreale, the unconvicted distiller, in the vicinity of a store in Utica, whose store it does not appear. On three occasions Morreale and another convicted defendant procured yeast in cartons and some in kegs at the store and on one occasion John Nole told the person in charge of the store to let them have the yeast; that John Noles' information return required by the Government of all sales of yeast in excess of five pounds to one person did not show in February or March, 1938, any sale of yeast to Morreale or any sale of keg yeast.